Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

October Term, 1996

ATLAS TURNER, INC.,

Petitioner

versus

HAROLD E. STRAUB and PAULINE STRAUB, husband and wife; BERNARD F. SIMBURGER and ROXIE L. SIMBURGER, husband and wife; and HELEN CONKWRIGHT, as surviving spouse of WILLIAM F. CONKWRIGHT, deceased, and on her own behalf,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Respondents were required to serve Petitioner Atlas Turner, Inc., a Canadian Crown Corporation, with the default judgments under § 1608(e) of the Foreign Sovereign Immunities Act of 1976.

2. Whether the default judgments against Petitioner Atlas Turner, Inc. should be set aside where Respondents did not serve Atlas Turner, Inc. with the default judgments and where Respondents' service of original process on Atlas Turner, Inc. did not strictly comply with § 1608(b) of the Foreign Sovereign Immunities Act of 1976.

LIST OF ALL PARTIES TO THE PROCEEDINGS

This petition concerns three cases involving closely related questions. Petitioner Atlas Turner, Inc. was the sole remaining defendant in each of the cases at the time it moved to set aside the default judgments. Respondents to this petition were the plaintiffs in the proceedings below: Harold E. Straub and Pauline Straub ("Straub"), Bernard F. Simburger and Roxie L. Simburger ("Simburger") and Helen Conkwright, as surviving spouse of William F. Conkwright, deceased, and on her own behalf ("Conkwright").

The defendants sued by plaintiffs Straub and Simburger included A.P. Green Refractories Co., a Delaware corporation; Amchem Products, Inc., a Delaware corporation; Armstrong World Industries, a Pennsylvania corporation; Atlas Asbestos Company, Ltd., a foreign corporation; Atlas Turner, Inc., a foreign corporation; The Celotex Corporation, a Delaware corporation; Carey-Canada, Inc., a foreign corporation; Eagle-Picher Industries, Inc., an Ohio corporation; Fibreboard Corporation, a Delaware corporation; Flintkote Company, a Massachusetts corporation; G.A.F. Corporation, a Delaware corporation; Keene Corporation, a New Jersey corporation; Owens-Corning Fiberglas Corp., a Delaware corporation; Owens-Illinois, Inc., an Ohio corporation; Pittsburgh-Corning Corp., a Pennsylvania corporation; Quigley Company, Inc., a foreign corporation; Rock Wool Manufacturing Co., Inc., an Alabama corporation; Southwest Petro Chem, Inc., a Kansas corporation; and Standard Insulations, Inc. a Missouri corporation.

The defendants sued by plaintiff Conkwright included A C & S, Inc., a Pennsylvania corporation; A.P. Green Refractories Co., a Delaware corporation; Amchem Products, Inc., a Delaware corporation; Armstrong World Industries, a Pennsylvania corporation; Atlas Asbestos Company, Ltd., a foreign corporation; Atlas Turner, Inc., a foreign corporation; The Celotex Corporation, a Delaware corporation; Carey-Canada, Inc., a foreign corporation; Eagle-Picher Industries, Inc., an Ohio corporation; Fibreboard Corporation, a Delaware corporation; Flintkote Company, a Massachusetts corporation; G.A.F. Corporation, a Delaware corporation; Keene Corpora-

tion, a New Jersey corporation; Owens-Corning Fiberglas Corp., a Delaware corporation; Owens-Illinois, Inc., an Ohio corporation; R.A. Keasbey Co., a foreign corporation; and Rock Wool Manufacturing Co., Inc., an Alabama corporation.

Pursuant to Supreme Court Rule 29.6, Atlas Turner, Inc. states that at the time plaintiffs commenced their suits, and at all times concerning service of the summons and amended complaint and institution of default proceedings in each of these cases, all shares of Atlas Turner, Inc. were owned by Societe Nationale de l'Amiante ("S.N.A."). S.N.A. is a Crown Corporation of the Province of Quebec, Canada, and did not issue shares to the public. In September 1992, S.N.A. sold all of its shares in Atlas Turner, Inc. to Mazarin, Inc. Atlas Turner, Inc. is currently a wholly-owned subsidiary of Mazarin, Inc. which is a publicly traded corporation.

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ATLAS TURNER, INC.,

Petitioner

versus

HAROLD E. STRAUB and PAULINE STRAUB, husband and wife; BERNARD F. SIMBURGER and ROXIE L. SIMBURGER, husband and wife; and HELEN CONKWRIGHT, as surviving spouse of WILLIAM F. CONKWRIGHT, deceased, and on her own behalf,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, Atlas Turner, Inc. ("Atlas Turner") requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in these actions on November 7, 1996, which affirmed judgments of the United States District Court for the District of Arizona.

OPINIONS BELOW

In *Straub,* the District Court's first opinion was unreported: *Straub v. A.P. Green, Inc.,* No. CV-85-00431-SMM, slip

op. (D. Ariz. May 27, 1992). (Petitioner's Appendix 38a.)[1] The first opinion of the Court of Appeals for the Ninth Circuit is reported at 38 F.3d 448. (Pet. App. 15a.)

In *Conkwright,* the District Court's first opinion was unreported: *Conkwright v. A.C. & S., Inc.,* No. CV-85-00155-RMB, slip op. (D. Ariz. Nov. 16, 1993). (Pet. App. 35a.) The first opinion of the Court of Appeals for the Ninth Circuit was unreported: *Conkwright v. AC&S, Inc.,* No. 94-15066, slip op. (9th Cir. Oct. 17, 1994). (Pet. App. 13a.)

In *Simburger,* the District Court's first opinion was unreported: *Simburger v. The Celotex Corp.,* No. CV-85-00435-RCB, slip op. (D.Ariz. Dec. 7, 1993). (Pet. App. 29a.) The first opinion of the Court of Appeals for the Ninth Circuit was unreported: *Simberger (sic) v. The Celotex Corp.,* No. 94-15095, slip op. (9th Cir. Oct. 17, 1994). (Pet. App. 11a.)

On remand from the Ninth Circuit, the District Court's second opinion, issued in all three cases, was unreported: *Straub v. A.P. Green, Inc.,* Nos. CV-85-0431-SMM, CV-95(sic)-0133-SMM, CV-85-00435-RCB, slip op. (D. Ariz. May 19, 1995). (Pet. App. 4a.) On return to the Court of Appeals, the Ninth Circuit's opinion was unpublished: *Conkwright v. AC&S, Inc.,* Nos. 95-16049, 95-16086, 95-16101, slip op. (9th Cir. Nov. 7, 1996). (Pet. App. 1a.) The Ninth Circuit denied Atlas Turner's petition for rehearing and rejected the suggestion for rehearing en banc. *Conkwright v. AC&S, Inc.,* Nos. 95-16049, 95-16086, 95-16101, slip op. (9th Cir. Dec. 20, 1996). (Pet. App. 62a.)

JURISDICTION

The judgments of the Court of Appeals for the Ninth Circuit were entered in all three cases on November 7, 1996. (Pet. App. 1a.) On December 20, 1996, the Ninth Circuit denied Atlas Turner's petition for rehearing. *Conkwright v. AC&S, Inc.,* Nos. 95-16049, 95-16086, 95-16101, slip op. (9th Cir. Dec. 20, 1996). (Pet. App. 62a.) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1994).

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1. References to Petitioner's Appendix will be made in the format "Pet. App." followed by the page number.

STATUTES AND FEDERAL RULES INVOLVED

28 U.S.C. § 1254 (1994) Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

28 U.S.C. § 1330 (1994) Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title. . . .

28 U.S.C. § 1332 (1982) Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between —

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and . . .

28 U.S.C. §1602 (1994) Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 U.S.C. §1603 (1994) Definitions

For purposes of this chapter –

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity –

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. §1608 (1994) Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state —

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

* * *

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

28 U.S.C. §1609 (1994) Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

28 U.S.C. §1610 (1994) Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if —

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property —

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided,* That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if —

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5), or 1605(b) of this chapter, regardless of whether the property is or was used for the activity upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under Section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if —

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

Federal Rule of Civil Procedure 60. Relief From Judgment or Order

* * *

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to

grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

Plaintiffs Straub, Simburger and Conkwright separately commenced their asbestos personal injury actions in February 1985, in the United States District Court for the District of Arizona. They averred the District Court had diversity jurisdiction pursuant to 28 U.S.C. § 1332 (1982). Approximately a year and a half later, in September 1986, plaintiffs filed amended complaints which added petitioner Atlas Turner as a defendant. That same month, plaintiffs purportedly attempted service of the summonses and amended complaints, in English, on Atlas Turner by registered mail, return receipt requested, addressed to Atlas Turner's headquarters in Montreal, Quebec, Canada. The summonses incorrectly identified the time to respond to the amended complaints as thirty (30) days rather than sixty (60) days. (Pet. App. 78a, 82a.) 28 U.S.C. § 1608(d) (1994). The return of service filed in each case indicated that the return receipt was signed by "C. Benoit" and another individual, unknown to Atlas Turner, whose name appears to be "Burello."

Atlas Turner did not receive notice of these lawsuits and did not respond to the amended complaints in any of these three cases. The plaintiffs obtained default judgments against Atlas Turner: for Simburger, $75,000 plus costs, on March 8, 1988 (Pet. App. 61a); for Conkwright, $250,000 plus costs, on October 7, 1988 (Pet. App. 60a); and for Straub, $506,300, on April 1, 1991 (Pet. App. 57a). Atlas Turner did not receive notice of these default judgments, by mail, personal service or otherwise. (Pet. App. 67a, 71a, 74a.)

As its local defense counsel learned of these default judgments entered against it, Atlas Turner filed motions to set

aside the default judgments contending, *inter alia,* that under the Foreign Sovereign Immunities Act of 1976 (sometimes referred to hereafter as "FSIA"), codified in part at 28 U.S.C. §§ 1602-1611 (1994)[2], the Court lacked jurisdiction over it and the default judgments were void. The District Court refused to set aside the default judgment in *Straub v. A.P. Green, Inc.,* No. CV-85-00431-SMM, slip op. (D. Ariz. May 27, 1992)(Pet. App. 38a), finding, *inter alia,* that:

a. As an instrumentality of a foreign sovereign, Atlas Turner was not entitled to notice of the default judgment under 28 U.S.C. §1608(e). Section 1608(e) requires service of default judgments on foreign states and political subdivisions, but not their agencies or instrumentalities. *Straub v. A.P. Green, Inc.,* No. CV-85-00431-SMM, slip op. at 24-25 (D. Ariz. May 27, 1992)(Pet. App. 55a-56a).

b. Plaintiffs served Atlas Turner with a copy of the summons and complaint, sent by registered mail-return receipt requested, to Atlas Turner at its headquarters. A person named C. Benoit signed for the documents on September 22, 1986. Because attorneys for Atlas Turner contacted the Court about the status of the case prior to the entry of the default judgment on April 1, 1991, Atlas Turner had actual notice of the lawsuit. *Id.* at 23. (Pet. App. 55a.)[3]

c. Atlas Turner is subject to the Court's jurisdiction; the default judgment against Atlas Turner is not void and Atlas Turner is not entitled to relief under Federal Rule of Civil Procedure 60(b). *Id.* at 25. (Pet. App. 56a.)

Citing *Straub,* the District Court subsequently refused to set aside the default judgments in *Conkwright v. AC&S, Inc.,* No. CV-85- 00155-RMB, slip op. (D. Ariz. Nov. 16, 1993)(Pet.

2. Hereafter, all cites to the United States Code are to the current edition, i.e., 1994 edition.

3. It should be noted that Atlas Turner denied any such contact with the Court prior to the entry of the default judgment.

App. 35a) and *Simburger v. The Celotex Corp.*, No. CV-85-00435-RCB, slip op. (D.Ariz. Dec. 7, 1993)(Pet. App. 29a).

Atlas Turner appealed the *Straub, Conkwright,* and *Simburger* rulings to the United States Court of Appeals for the Ninth Circuit. In *Straub v. A. P. Green, Inc.*, 38 F.3d 448 (9th Cir. 1994)(Pet. App. 15a), the Ninth Circuit held, *inter alia,* that:

a. At the time the lawsuit was filed, Atlas Turner was wholly owned by Societe Nationale de L'Amiante, a Crown Corporation of the Province of Quebec; therefore, it was an instrumentality of a foreign state to which the FSIA applies. *Id.* at 451. (Pet. App. 22a.)

b. As an instrumentality of a foreign sovereign, Atlas Turner *was not entitled to notice of the default judgment* under 28 U.S.C. §1608(e) which requires service of default judgments on foreign states and political subdivisions, but not their agencies or instrumentalities. *Id.* at 454. (Pet. App. 28a.)

c. The summons and complaint were received at Atlas Turner's headquarters and signed for by C. Benoit on September 22, 1986, but plaintiff did *not* satisfy his burden of proving actual notice of the lawsuit in 1986. *Id.* at 454. (Pet. App. 27a.)

d. Plaintiffs do not have to strictly comply with the FSIA service requirements. Plaintiffs are only required to substantially comply with the FSIA service requirements but they must prove that the defendant received actual notice of the suit and was not prejudiced by the lack of compliance with the FSIA. In any event, plaintiffs must serve a complaint in the correct language. *Id.* at 453. (Pet. App. 26a.)

e. Plaintiffs' lack of strict compliance with the service requirements of the FSIA did not *per se* deprive the District Court of jurisdiction. *Id.* at 455. (Pet. App. 28a.)

The Ninth Circuit remanded all three cases for a determination of whether Atlas Turner had actual notice of the com-

plaint in 1986. (Pet. App. 12a, 14a, 28a). On remand, the District Court consolidated the cases for purposes of making its determination regarding notice. In *Straub v. A.P. Green, Inc.*, Nos. CV-85-0431-SMM, CV-95-00133-SMM, No. CV-85-00435-RCB, slip op. (D. Ariz. May 19, 1995)(Pet. App. 4a), the District Court found as follows:

a. Plaintiffs complied with the translation requirement of 28 U.S.C. § 1608(b)(3). Service of the amended complaints, in English, complies with 28 U.S.C. § 1608(b)(3) because the official languages of Canada are English and French. *Id.* at 3-4. (Pet. App. 5a-6a.)

b. Plaintiffs mailed a copy of the summons and complaint to Atlas Turner's headquarters; the receipt was signed by C. Benoit who, in September 1986, worked as a secretary and receptionist for Atlas Turner's Vice President of Sales and Marketing. Atlas Turner's Comptroller supervised Ms. Benoit. One of Ms. Benoit's duties was sometimes to receive the mail. *Id.* at 5-6. (Pet. App. 7a-8a.) Plaintiffs proved that they effected service by a method that was reasonably calculated to give actual notice to Atlas Turner which was not contradicted by any evidence by Atlas Turner; therefore, Atlas Turner had actual notice of the lawsuit in 1986. *Id.*

The District Court ordered the action returned to the Ninth Circuit, *Id.* at 8-9 (Pet. App. 10a), which on November 7, 1996 affirmed the District Court's denial of Atlas Turner's motion to set aside the default judgments. (Pet. App. 1a.)

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve conflicts between the Circuits in interpreting the default and service provisions of the Foreign Sovereign Immunities Act of 1976, codified at 28 U.S.C. § 1608. These provisions raise important questions of federal law.

I

SINCE BOTH EXECUTIVE AND CONGRESSIONAL CONCERNS ARE EMBODIED IN THE FSIA, INTERPRETATION BY THIS COURT IS ESSENTIAL FOR THE ORDERLY REGULATION OF LITIGATION AGAINST FOREIGN SOVEREIGNS AND THEIR INSTRUMENTALITIES

The Foreign Sovereign Immunities Act of 1976 is extremely important federal legislation affecting foreign relations, commerce, and private interests. Both the necessity, as well as the impact, of the FSIA are reflected in its lengthy gestation and legislative history. *See generally* 122 Cong. Rec. 33,532-36, 34,566 (1976); H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976), *reprinted* in 1976 U.S. Code Cong. & Admin. News 6604 [hereinafter "House Report"]; S. Rep. No. 1310, 94th Cong., 2d Sess. (1976) [hereinafter "Senate Report"]; *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the Comm. on the Judiciary of the House of Representatives,* 94th Cong., 2d Sess. (1976) [hereinafter "1976 House Hearings"]; *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the Comm. on the Judiciary of the House of Representatives,* 93rd Cong., 1st Sess. (1973)[hereinafter "1973 House Hearing"].

As noted by the Honorable Charles N. Brower, Legal Advisor, Department of State, in his remarks at the 1973 House Hearing on the proposed legislation addressing jurisdictional immunities of foreign states:

> This legislation has been prepared and recommended by the administration because the current situation with respect to suits against foreign countries is unsatisfactory and is criticized by plaintiffs and foreign governments alike.

1973 House Hearing, *supra,* at 14. As explained by Mr. Brower, the lack of statutory procedures for obtaining personal jurisdiction over foreign states forced plaintiffs to resort

to pre-suit attachment without having any means for executing on judgments, and required the Department of State to make formal suggestions of immunity to courts relating to foreign government claims of immunity from jurisdiction, attachment or execution. *Id.* The Department of State believed that the courts should assume responsibility for such important decisions:

> We at the Department of State are now persuaded—and may I say we have been for some time—that the foreign relations interests of the United States as well as the rights of litigants would be better served if these questions of law and fact were decided by the courts rather than by the executive branch. Questions of such moment should not be decided through administrative procedures when the nature of the decision appears particularly appropriate for resolution by the courts. Indeed, State Department involvement can be detrimental because some foreign states may be led to believe that since the decision can be made by the executive branch it should be strongly affected by foreign policy considerations. Consequently, foreign states are sometimes inclined to regard a decision by the State Department refusing to suggest immunity as a political decision unfavorable to them rather than a legal decision. *Id.*

The legislation proposed in 1973 was not enacted. In 1976, Congress again considered legislation and held hearings covering the testimony of many witnesses representing a wide range of interests. *See generally* 1976 House Hearings, *supra.* At the 1976 hearings, The Honorable Monroe Leigh, Legal Advisor, Department of State, reiterated the history of the legislation, the perceived deficiencies in the legislation proposed in 1973, including provisions relating to jurisdiction and service, the additional efforts made to address the problems involved in suits against foreign sovereigns, and how the 1976 proposed legislation would address the interests involved:

> Since 1973, Mr. Chairman, the Departments of State and Justice have consulted extensively with members of the private bar and the academic community. Gaps that

existed in the predecessor bill have been filled. In short, the bill now before you for consideration represents the efforts not only of the administration, but also of many persons in the legal community who believe that legislative attention to this area of the law has now become necessary.

What function would the bill serve? On its surface, H.R. 11315 may seem somewhat technical. But the general purpose is simple: To assure that American citizens are not deprived of normal legal redress against foreign states who engage in ordinary commercial transactions or who otherwise act as a private party would.

At the heart of the bill are some modern-day realties (sic). Increasingly, our citizens have legal rights that come into contact with foreign governments and their agencies. . . . [1976 House Hearings, *supra,* at 24.]

Mr. Chairman, the Congress has never before been called upon to respond to these situations. ...[I]t is only in comparatively recent years that private parties in this country have come into frequent contact with foreign government entities.

Now, however, it seems clear that our judicial system requires comprehensive standards on when and how a citizen can maintain a lawsuit against a foreign state or its entities and when a foreign state is entitled to sovereign immunity. . . .

With this as background, Mr. Chairman, I turn to the specific objectives and some of the provisions of H.R. 11315. This bill has four basic objectives. ... Third, the bill would set forth, for the first time, in our judicial code, comprehensive methods for beginning a lawsuit against a foreign state through service of process and for obtaining personal jurisdiction over foreign-government defendants. This, in turn, would obviate the necessity of attempting to begin a lawsuit by attaching a foreign government's property. Such attachments are the one area where an occa-

> sional diplomatic problem has arisen in the past. Fourth, H.R. 11315 would for the first time provide U.S. citizens with the remedy of execution to satisfy a final judgment against a foreign state. . . . [1976 House Hearings, *supra,* at 25.] . . .
>
> [T]he broad purposes of the bill are "to facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation." ... We believe that [the bill] deserves the urgent consideration of the Congress. [1976 House Hearings, *supra,* at 29.]

Heeding the call for legislation, Congress enacted the FSIA. The House and Senate reports reiterated the history and gestation of the FSIA which, as reported, was designed to facilitate litigation against foreign sovereigns while minimizing effects on foreign policy. House Report, *supra,* 6-11; Senate Report, *supra,* 7-11. As both reports noted, prior to the enactment of the FSIA,

> . . . there [were] no comprehensive provisions in our law available to inform parties when they have recourse to the courts to assert a legal claim against a foreign state. Unlike other legal systems, U.S. law *[did] not afford plaintiffs and their counsel with a means to commence a suit that is specifically addressed to foreign state defendants* . . . [emphasis added] [House Report, *supra,* 7; Senate Report, *supra,* 8.]

Congress' accommodation of foreign policy and due process concerns is reflected, in part, in the highly specific service and execution provisions of the FSIA. Congress eliminated the need for litigants to use pre-suit attachment against foreign sovereigns and established a specific statutory scheme for making service, obtaining in personam jurisdiction, and obtaining and satisfying judgments. 122 Cong. Rec. 33,532 (1976)(statement of Rep. Danielson); 28 U.S.C. §§ 1330(b), 1608-1610. As to the service provisions, Representative Danielson succinctly summarized the key points of the FSIA:

> . . . For the first time in U.S. law, the bill would provide a statutory procedure for making service upon, and obtaining in personam jurisdiction over, a foreign state and its entities. Such procedures exist in other countries— sections 1330(b) and 1608.
>
> To further reduce foreign relations irritants, the bill makes it unnecessary to commence a lawsuit by locating and attaching foreign government property. But the bill does provide a method whereby a private litigant can, under express court directions and as a last resort, satisfy a final judgment from commercial property — sections 1609-1610. [122 Cong. Rec. 33,532 (1976)]

Since 1976, numerous courts have had to address the service provisions of the FSIA. As the Court noted in *Harris Corp. v. National Iranian Radio and Television,* 691 F.2d 1344, 1352 n. 16 (11th Cir. 1982):

> Though we find service adequate here, we admonish those seeking to invoke the FSIA to follow the service provisions it contains. Congress has carefully established a flexible framework so that American plaintiffs will have a variety of acceptable methods of service, even when relations with the foreign country in question are strained; at the same time, the framework is designed to insure that foreign defendants will get notice. There is no excuse for departure from the dictates of the statute. ...

As noted by the Court in *Unidyne Corp. v. Aerolineas Argentinas,* 590 F. Supp. 391, 394 (E.D. Va. 1984):

> Section 1608 sets forth the *exclusive* procedures for service on a foreign state. . . . Congress by enacting the [FSIA] intended the specific service of process requirements contained in the statute to be followed exactly recognizing the difficulties inherent in cross-cultural and cross-lingual litigation. *Gray v. Permanent Mission of the People's Republic of the Congo to the United Nations,* 443 F. Supp. 816, 821 (S.D.N.Y. 1978) *aff'd* 580 F.2d 1044 (1978) Every mode of service prescribed assumes either

> prior agreement as to manner of service or mandates *strict attention* to the linguistic and diplomatic problems inherent in such situations. *Id.* . . . In light of this strong public policy articulated by Congress to insure adequate notice in litigation against a foreign state, this Court is directed to strictly interpret the requirements set forth in § 1608(b).

The issues raised by the *Straub, Simburger* and *Conkwright* cases involve § 1608 of the FSIA. The procedures set forth in § 1608 were designed to facilitate litigation and protect litigants' interests. Petitioner Atlas Turner respectfully submits that inconsistent interpretation of Section 1608 undermines the purpose of the FSIA which is to "protect the rights of both foreign states and litigants in United States courts." 28 U.S.C. § 1602. Inconsistent interpretation raises questions of fairness and predictability for plaintiffs and foreign sovereign defendants.

The ability to litigate against a foreign sovereign and its instrumentalities represents an important balance between the rights of aggrieved persons to have access to the courts and the protection of foreign sovereigns in the United States from the ills of parochialism. One need only cast even a casual glance at the furor over laws such as the so-called Helms-Burton Act[4] and the so-called D'Amato Bill[5] to appreciate the impact and importance of legislation that attempts to address foreign policy, commerce and private interests together. In contrast to those laws, however, the FSIA was specifically designed to minimize foreign policy implications by balancing the interests of plaintiffs and foreign sovereigns. As the leader in the world economic and diplomatic community, the United States, through it courts, must provide foreign sovereigns and their instrumentalities with the assurances that they will be protected from xenophobic excesses and that the rules of procedure will be applied to them fairly and on a constant basis,

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4. Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (1996).

5. Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (1996).

consistent with the FSIA. Only through resolution of interpretations, by this Court, can that goal be achieved.

II

THE NINTH CIRCUIT AND SIXTH CIRCUIT DECISIONS CONFLICT AS TO WHETHER PLAINTIFF MUST SERVE AN INSTRUMENTALITY OF A FOREIGN SOVEREIGN WITH A COPY OF A DEFAULT JUDGMENT

The central issue presented by these cases concerns service of default judgments on instrumentalities of foreign sovereigns. The Ninth Circuit held that *no* such service is required while the Sixth Circuit held that such service *is* required. Section 1608(e) of the FSIA provides:

> No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. *A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.* [emphasis added]

In *Straub v. A.P. Green, Inc.,* 38 F.3d 448, 454 (9th Cir. 1994)(Pet. App. 15a, 27a), the Ninth Circuit upheld the decision of the District Court and adopted its reasoning:

> The [District] Court noted that the second sentence of §1608(e), which requires service of a copy of the default judgment, refers only to a "foreign state or political subdivision," whereas the first sentence of §1608(e) refers to a "foreign state, a political subdivision thereof or an agency or instrumentality of a foreign state." The court reasoned that Atlas Turner was not entitled to service of the default judgment because the second sentence of §1608(e) makes no reference to an "instrumentality of a foreign state." . . . We agree.

In further support of its decision, the Ninth Circuit noted that, pursuant to 28 U.S.C. §1603(a), a "foreign state" includes

instrumentalities except as used in §1608. *Id.* The Ninth Circuit concluded "when the term foreign state is used in §1608, it does not encompass instrumentalities of foreign states." *Id.* In response to Atlas Turner's argument that the legislative history of the FSIA demonstrates Congress' intent to require service of default judgments on foreign sovereigns, their political subdivisions, and their agencies and instrumentalities, the Ninth Circuit simply stated that "resort to the legislative history is not necessary when the language of the statute is not ambiguous. [citation omitted]" *Id.*

In *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105 (6th Cir. 1995), the Sixth Circuit interpreted the § 1608(e) service provisions in an identical context. Once again a default judgment was taken against Atlas Turner. The Sixth Circuit noted the Ninth Circuit's holding in *Straub* but rejected it, stating:

> [W]e do not . . . construe statutory phrases in isolation; we read statutes as a whole. *United States v. Morton*, 467 U.S. 822, 828 . . . (1984). The first sentence of §1608(e) establishes the procedure for obtaining a default judgment against "a foreign state, a political subdivision thereof, *or an agency or instrumentality of a foreign state.*" 28 U.S.C. §1608(e). . . . The second sentence says that "*such* default judgment" shall be sent to "the foreign state or political subdivision." . . . This requires that any judgment, including judgments against agencies and instrumentalities or political subdivisions, obtained through the procedure described in the first sentence should be sent to the foreign state.

Antoine, 66 F.3d at 109. *See also, First City, Texas-Houston, N.A. v. Rafidain Bank*, No. 90 Civ. 7360, 1992 U.S.Dist. LEXIS 15235 slip op. at 3 n.2 (S.D.N.Y. Oct. 6, 1992)(plaintiff 'failed to comply with § 1608(e), which provides that any default judgment "shall be sent to the foreign state or political division in the manner prescribed for service in this section. . . ."'); *LeDonne v. Gulf Air, Inc.*, 700 F. Supp. 1400, 1414 (E.D. Va. 1988)(failure to serve a copy of default judgment on instrumentality of foreign sovereign "contravenes the

requirements of the FSIA and, therefore, deprives this Court of the power to enforce the . . . judgment").

Atlas Turner respectfully submits that the Ninth Circuit's and the Sixth Circuit's disagreement about the meaning of the second sentence of §1608(e) leaves unresolved the critical question of service of default judgments. Commentators who have had occasion to study the FSIA have concluded that §1608(e) requires that notice of a default judgment be sent to the defendant pursuant to the service provisions of §1608(a) and (b):

> *Service of Entries of Default and Default Judgments*
>
> Section 1608(e) requires that once a claimant establishes its right to relief by evidence satisfactory to the court and a default judgment is entered, a copy of such judgment must be sent to the foreign state in the manner prescribed for service in subsections (a) and (b).

George, *A Practical and Theoretical Analysis of Service of Process under the Foreign Sovereign Immunities Act,* 19 Int'l Law. 49, 57 (1985).

> *Default Judgments.*
>
> No default judgment may be entered against a foreign state or its instrumentality "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." This is the same rule that applies to default judgments against the United States. . . . After a default judgment has been entered, the defendant must be so notified in the manner prescribed for service.

Carl, *Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice,* 33 Sw. L.J. 1009, 1038 (1979).

In light of the facial ambiguity of the statute, the legislative history of the FSIA should be consulted. The very fact that the Ninth and Sixth Circuits disagree invites such a review. That legislative history shows that Congress intended default judgments to be served on defendants regardless of

whether the defendant is a foreign sovereign, political subdivision or agency or instrumentality:

> (e) *Default Judgments.*—Subdivision (e) of section 1608 provides that no default judgment may be entered against a foreign state, or its political subdivisions, agencies or instrumentalities, "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." This is the same requirement applicable to default judgments against the U.S. Government under rule 55(e), F.R.Civ.P. . . . Once the default judgment is entered, notice of such judgment must be sent *in the manner prescribed for service in sections 1608(a) or (b).* [emphasis added]

House Report, *supra,* at 26; Senate Report, *supra,* at 25. Service under 28 U.S.C. § 1608(b) relates to service on agencies or instrumentalities.

Given the ambiguity of the statute, its legislative history and the conflict in interpretation between the Ninth and Sixth Circuits, Atlas Turner respectfully submits that this Court should grant the petition for certiorari and resolve the question of whether 28 U.S.C. § 1608(e) requires that a default judgment be served on an instrumentality of a foreign sovereign.

III

COURTS INCONSISTENTLY INTERPRET THE SERVICE PROVISIONS OF 28 U.S.C. § 1608

Throughout the proceedings below, Atlas Turner contended that it did not receive notice of the default judgments and was not properly served with the summonses and complaints, pursuant to the FSIA. Accordingly, Atlas Turner sought to have the default judgments in these cases set aside under Fed.R.Civ.P. 60(b). Setting aside the default judgments involves two questions of service under 28 U.S.C. § 1608:

(1) If service of the default judgments is required, what constitutes service of the default judgments pursuant to § 1608(e).

(2) What constitutes service of original process pursuant to § 1608 (a) and (b).

The § 1608(e) language relating to service of default judgments simply refers to the service provisions under § 1608. Accordingly, the service issues relating to the question of setting aside the default judgments can be addressed by analyzing the cases interpreting § 1608(a) and (b). However, the courts have inconsistently interpreted these service provisions. Furthermore, the judicial inconsistencies are not fully explained by the FSIA's statutory scheme for service which provides separate though similar methods for serving foreign sovereigns under § 1608(a) and their instrumentalities under § 1608(b).

Some courts require what is sometimes referred to as "substantial compliance" with the FSIA service requirements. In assessing plaintiffs' compliance with the service requirements, these courts focus on whether defendants received actual notice. They excuse plaintiffs' lack of compliance with the statutory provisions of the FSIA. *Straub v. Atlas Turner, Inc.,* 38 F.3d 448 (9th Cir. 1994)(Pet. App. 15a)(substantial compliance permitted under § 1608(b)(3)(B) but proof of "actual notice" and proof of no prejudice required); *Sherer v. Construcciones Aeronauticas S.A.,* 987 F.2d 1246 (6th Cir.)(omission of translation of complaint did not warrant dismissal regardless of the §1608(b) translation requirement, given the fact that the instrumentality had actual notice of the action), *cert. denied,* 510 U.S. 818 (1993); *Harris Corp. v. National Iranian Radio and Television,* 691 F.2d 1344 (11th Cir. 1982)(service was sufficient in light of defendant's actual notice of lawsuit, despite plaintiff's non-compliance with § 1608(b) where plaintiff notified defendant by three different methods); *Velidor v. L/P/G Benghazi,* 653 F.2d 812 (3d Cir. 1981)(service under the FSIA is designed to give actual notice; plaintiff complied with the service requirements of §1608(b)(2) by serving ship's master who, by law, was deemed to be the defendant's agent), *cert. dismissed,* 455 U.S. 929 (1982); *Obenchain Corp. v. Corp. Nacionale de Inversiones,* 656 F. Supp. 435 (W.D.Pa. 1987)(plaintiff substantially complied with § 1608 even though documents were not dispatched

by the clerk of the court and did not include notice of suit), *aff'd in part, rev'd in part,* 898 F.2d 142 (3d Cir. 1990); *Banco Metropolitano v. Desarrollo de Autopistas,* 616 F. Supp. 301 (S.D.N.Y. 1985)(plaintiff complied with § 1608(b) even though documents were not dispatched by the clerk of the court and did not include translation); *Marlowe v. Argentine Naval Comm'n,* 604 F. Supp. 703 (D.D.C. 1985)(plaintiff complied with § 1608(a) even though plaintiff did not serve entity specified in special agreement between the parties).

Others courts require "strict compliance" with the FSIA service requirements. These courts hold that actual notice does not cure defects in plaintiffs' failure to follow statutory provisions. *Transaero, Inc. v. La Fuerza Aerea Boliviana,* 30 F.3d 148 (D.C. Cir. 1994)(default judgment against the Bolivian Air Force would not be enforced, regardless of the defendant's actual notice of the lawsuit, because plaintiff served defendant pursuant to § 1608(b) and failed to serve the correct entities pursuant to § 1608(a)(3) and (4)), *cert. denied,* 115 S.Ct. 1101 (1995); *Gerritsen v. Consulado General de Mexico,* 989 F.2d 340 (9th Cir.)(service of the complaint by registered mail addressed to the President of Mexico was inadequate due to plaintiff's failure to include the required translation of the complaint, regardless of defendant's actual notice), *cert. denied,* 510 U.S. 828 (1993); *Alberti v. Empresa Nicaraguense De La Carne,* 705 F.2d 250 (7th Cir. 1983)(service on the Ambassador of Nicaragua failed to comply with the service requirements under § 1608(a)(3) relating to the head of the ministry of foreign affairs, regardless of actual notice); *Finamar Investors, Inc. v. Republic of Tadjikistan,* 889 F. Supp. 114 (S.D.N.Y. 1995)(strict compliance under § 1608(a) not satisfied where wrong entity was served with documents translated into the wrong language but plaintiffs would be given time to cure service defects); *Shell Oil Co. v. M/V Itanage,* 830 F. Supp. 1423 (M.D. Fla. 1993)(service requirements of § 1608(b) not met because letter of undertaking would not be deemed to be a special arrangement by which counsel became amenable to service but plaintiff would be given time to cure service defects); *First City, Texas-Houston, N.A. v. Rafidain Bank,* No. 90 Civ. 7360, 1992 U.S.Dist. LEXIS 15235, slip op.

(S.D.N.Y. Oct. 6, 1992)(service of pleadings on the Iraq Permanent Representative to the United Nations was ineffectual under § 1608(b)(1) and fatal to its claim, regardless of defendant's awareness of the lawsuit and default judgment); *Lucchino v. Brazil,* 631 F. Supp. 821 (E.D.Pa. 1986)(strict compliance with § 1608(a) not met where plaintiff failed to include a translation and notice of suit and where the wrong entity was served, but dismissal was stayed to allow plaintiff to cure service defects); *Lippus v. Dahlgren Manufacturing Co.,* 644 F. Supp. 1473 (E.D.N.Y. 1986)(strict compliance with § 1608(b) not met where papers were not dispatched by the clerk of court and included no translation; service by state law methods would not be allowed); *Magnus Electronics, Inc. v. Royal Bank of Canada,* 620 F. Supp. 387 (N.D. Ill. 1985)(strict compliance with § 1608(a)(3) not met where personal service rather than service by mail was effected), *aff'd in part, rev'd in part,* 830 F.2d 1386 (7th Cir. 1987); *Unidyne Corp. v. Aerolineas Argentinas,* 590 F. Supp. 391 (E.D.Va. 1984)(documents served on the Secretary of the Commonwealth of Virginia would not be deemed to comply with § 1608(b)(2)); *Gray v. Permanent Mission of People's Republic of the Congo to the United Nations,* 443 F. Supp. 816 (S.D.N.Y.)(strict compliance with §1608(a) not met by service of untranslated summons and complaint on "defendant's secretary"), *aff'd,* 580 F.2d 1044 (2d Cir. 1978).

The procedures set forth in § 1608 were written to facilitate litigation and protect plaintiffs' and defendants' interests. Petitioner Atlas Turner respectfully submits that inconsistent interpretation of Section 1608 undermines the purpose of the FSIA. By granting the petition for writ of certiorari, this Court can eliminate the inconsistencies and protect Congress' statutory accommodation of the broad range of foreign, commercial and private interests as reflected in the FSIA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: February 4, 1997

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HELEN CONKWRIGHT, as surviving spouse of William Conkwright, deceased, and on her own behalf,
Plaintiff-Appellee,

v.

A C & S INC.,
Defendant,

and

ATLAS TURNER, INC.
Defendant-Appellant.

BERNARD SIMBURGER; ROXIE SIMBURGER, husband and wife,
Plaintiffs-Appellees,

v.

CELOTEX CORPORATION,
Defendant,

and

ATLAS TURNER, INC.
Defendant-Appellant.

HAROLD E. STRAUB,
Plaintiff-Appellee,

v.

ATLAS TURNER, INC
Defendant-Appellant.

FILED
NOV 07 1996
Cathy A. Catterson, Clerk
U.S. Court of Appeals

No. 95-16049

D.C. No. CV-95-00133-SMM

No. 95-16086

D.C. No. CV-85-00435-RCB

No. 95-16101

D.C. No. CV-85-00431-SMM

MEMORANDUM*

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appeal from the United States District Court
for the District of Arizona
Stephen M. McNamee, District Judge, Presiding

Argued and Submitted October 8, 1996
San Francisco, California

Before: WOOD,** SCHROEDER, and HALL,
Circuit Judges

Defendant-Appellant Atlas Turner, Inc. appeals the district court order denying its motion to set aside default judgments entered in three related cases. We affirm.

I.

In *Straub v. A. P. Green*, 38 F.3d 448 (9th Cir. 1994) (*Straub I*), this court held that the Foreign Sovereign Immunities Act, 28 U.S.C. § 1601 *et seq.*, applied since Atlas was wholly owned by a Canadian instrumentality. The court adopted the "substantial compliance" test for service of process and remanded for the district court to decide whether Atlas had received "actual notice" of the lawsuit at the time service was attempted. *Straub*, 38 F.3d at 455. The other two cases were remanded for the same reason.

Upon remand, the district court made a number of factual findings. The summonses and complaints had been sent by registered mail to Atlas's corporate headquarters in Canada. "C. Benoit" signed the mail receipts as the addressee and "Burillo" signed them as the employee of the office of destination. In September of 1986, C. Benoit worked as a receptionist and secretary at Atlas. Ms. Benoit received supervision from Atlas' comptroller and worked for the Vice President of Sales and Marketing. As part of her job duties, Ms. Benoit received the mail. Based upon these findings, the district court concluded that Atlas had received actual notice of the complaints.

** Hon. Harlington Wood, Jr., Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

Atlas contests several of the district court's factual findings. Since they are all supported by the record, we decline to find any of them to be clearly erroneous.

Atlas also disputes the district court's ruling that Atlas received actual notice of the complaints, We find that the district court properly placed the burden of proof upon plaintiffs. Further, this court cannot fault the district court's conclusion that Atlas received actual notice of the lawsuits as a result of plaintiffs' attempted service, particularly since a determination of actual notice is a highly fact-bound inquiry. *See Perry v. O'Donnell,* 749 F.2d 1346, 1353 (9th Cir. 1984).

II.

Atlas also contends that the district court erred by failing to follow the "law of the case" as set forth in *Straub I.* The law of the case doctrine prevents a court from relitigating an issue previously decided by the same or higher court in the identical case. *Maag v. Wessler,* 993 F.2d 718, 720 n.2 (9th Cir. 1993).

In *Straub I,* this Court disapproved of the district court's finding that Atlas had actual notice. However, the court remanded for further consideration of actual notice since it was not a dispositive issue before the district court. *Straub,* 38 F.3d at 454. The law of the case doctrine does not apply because the district court considered substantially different facts on remand. *Milgard Tempering, Inc. v. Selas Corp. of America,* 902 F.2d 703, 715-16 (9th Cir. 1990).

CONCLUSION

We AFFIRM the order of the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

HAROLD E. STRAUB, et al., *Plaintiffs,* v. A.P. GREEN, INC., et al., *Defendants.*	CIV 85-0431-PHX-SMM CIV 95-0133-PHX-SMM CIV 85-0435-PHX-RCB
HELEN CONKWRIGHT, et al., *Plaintiffs,* v. A.P. GREEN, INC., et al., *Defendants.*	**FILED** **MAY 19 1995** CLERK US DISTRICT COURT DISTRICT OF ARIZONA BY [INITIALS] DEPUTY MEMORANDUM OF DECISION AND ORDER
BERNARD F. SIMBURGER, et al., v. THE CELOTEX CORP., et al., *Defendants.*	

PROCEDURAL BACKGROUND

Plaintiffs commenced this asbestos-related tort action against numerous defendants, one of which is Atlas Turner, Inc. ("Atlas").[1] At the time Plaintiffs filed this action, Atlas was owned by Societe Nationale de L'Amiante, a corporation of the Province of Quebec, Canada. Plaintiffs sent the summons and the complaint in the English language, via registered mail with return receipt requested, to Atlas. The receipt was thereafter returned to Plaintiffs with the signatures of "C. Benoit" and "Burillo" on September 22, 1986.

1. The Court uses the term "Plaintiffs" to collectively refer to the plaintiffs in all three actions.

Atlas did not respond to the Complaint and the Court entered a default judgment on April 1, 1991. On March 23, 1992, the Court held an evidentiary hearing on Atlas's motion to set aside the default judgment. Although the parties focused mainly on the issue of whether the Court had personal jurisdiction over Atlas, Atlas contended that Plaintiffs did not comply with the Foreign Sovereign Immunities Act ("FSIA") because the summons and the complaint were not translated into French and the right person was not served with the initial lawsuit or the default judgment. Tr. at 12, 26. The Court denied Atlas's motion to set aside the default judgment and found that Plaintiffs complied with the service requirements of the FSIA, 28 U.S.C. § 1608(b)(2).

On Atlas's appeal, the Ninth Circuit held that the FSIA is applicable where a party is a foreign state at the time a plaintiff files the lawsuit, even if the party was not a foreign state at the time of the alleged wrongdoing. *Straub v. A.P. Green, Inc.*, 38 F.3d 448, 451 (9th Cir. 1994). The Ninth Circuit also adopted the substantial compliance test for the application of the FSIA and noted that although Plaintiffs substantially complied with the FSIA, the substantial compliance test is satisfied "only if Atlas Turner received actual notice of the lawsuit" in 1986. *Id.* at 453-54. The court further noted that Plaintiffs' "[f]ailure to deliver a complaint in the correct language is . . . a fundamental defect" that fails the substantial compliance test. *Id.* at 453. The court did not address the issue of personal jurisdiction. Rather, the court remanded the action to determine whether Atlas received actual notice of the lawsuit at the time the lawsuit was filed.

DISCUSSION

A. *Translation into the Official Language*

The Ninth Circuit found that 28 U.S.C. § 1608(b)(3) applies to this action. Section 1608 (b)(3) provides that absent the parties' special arrangements, service to a foreign defendant may be effected:

> . . . if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together

> with a translation of each into the official language of the foreign state ... (B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served ...

28 U.S.C. § 1608(b)(3) (1994).

Atlas is an instrumentality of Canada. Although the official language of Quebec is French, Canada utilizes two official languages, both English and French. *Compare The New Encyclopaedia Britannica* 490 (15th ed. 1994) (Macropaedia) *with The World Factbook* 73 (1994) (published by the Central Intelligence Agency). The Court recognizes the unusual circumstances in which the parties are situated and looks to the purpose behind the translation provision, which is to insure that the defendant had actual notice. *See Sherer v. Construcciones Aeronauticas,* 987 F.2d 1246, 1250 (6th Cir.), *cert. denied,* 114 S. Ct. 72 (1993) (holding that omission of Spanish translation of the complaint did not warrant dismissal given actual notice and lack of prejudice). Because the FSIA requires that service documents be translated into the "official language of the foreign state," which in this instance is Canada, the Court finds that Plaintiffs have complied with this requirement of § 1608(b)(3).

B. *Actual Notice*

Both parties rely on Black's Law Dictionary for the definition of "actual notice," which states:

> Actual notice has been defined as notice expressly and actually given, and brought home to the party directly. The term 'actual notice,' however, is generally given a wider meaning as embracing two classes, express and implied; the former includes all knowledge of a degree above that which depends upon collateral inference, or which imposes upon the party the further duty of inquiry; the latter imputes knowledge to the party because he is shown to be conscious of having the means of knowledge. In this sense[,] actual notice is such notice as is positively

> proved to have been given to a party directly and personally, or such as he has presumed to have received personally because the evidence within his knowledge was sufficient to put him upon inquiry.

Black's Law Dictionary, 1061-62 (6th ed. 1990).

Generally, due process requires a plaintiff, in any proceeding, to give "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950) Indeed, the requirement of § 1608 is consistent with such a due process requirement. *See* 28 U.S.C. § 1608 (b)(3) ("reasonably calculated to give actual notice") . Nevertheless, actual notice need not be inefficient or burdensome. *Tulsa Professional Collection Servs. v. Pope,* 485 U.S. 478, 489-90 (1988). Sending the summons and the complaint by mail is an inexpensive method of effecting service that is reasonably calculated to provide actual notice. *Id.* at 490; *Mennonite Bd. of Missions v. Adams,* 462 U.S. 791, 799 (1983).

A plaintiff has the burden of proving that the defendant received actual notice. *Straub,* 38 F.3d at 454. A plaintiff satisfies that burden if he can establish that he complied with the appropriate requirements of the service. In this action, Plaintiffs were required to effect service "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served."[2] *See* 28 U.S.C. § 1608(b)(3)(B).

Here, Plaintiffs mailed a copy of the summons and the complaint to "Atlas Turner, Inc. 5600 Hachelaga Street Montreal, Quebec, Canada HIN IWI." Plaintiffs Brief, Exh. A. The return receipt form stated: "This receipt must be signed by the addressee or by a person authorized to do so by virtue of the regulations of the country of destination, or, if those regulations so provide, by the employee of the office of desti-

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2. The Ninth Circuit found that Plaintiffs' failure to dispatch the summons and the complaint by the clerk of the court did not *per se* deprive the Court's jurisdiction. *Straub,* 38 F.3d at 453. The Court therefore does not address the portion of the statute relating to the clerk of the court.

nation. . . ." *Id.* The receipt was returned to Plaintiffs with signature by "C. Benoit" as the addressee and "Burillo" as the employee of the office of destination. *Id.* Under the circumstances, Plaintiffs have substantially complied with the requirements of § 1608(b)(3).

Plaintiffs argue that Atlas had actual notice because C. Benoit received the summons and the complaint on behalf of Atlas. In September of 1986, Ms. Benoit worked as a secretary and a receptionist for the Vice President of Sales and Marketing of Atlas, Pierre Champagne. Plaintiffs, Brief, Exh. B, at 2, 3. She was supervised by Atlas's Comptroller Yves Beaudry. *Id.* at 3. One of Ms. Benoit's duties was to "sometimes receive the mail." *Id. see also* Atlas Brief, at 21. Accordingly, Plaintiffs satisfied their burden of establishing that they attempted to effect service by a method that was reasonably calculated to give actual notice.[3] *See* 28 U.S.C. § 1608(b); *see also Pope,* 485 U.S. at 489-90.

To rebut Plaintiffs' argument, Atlas argues that Ms. Benoit was never authorized or appointed to accept service of process and had never acted in any executive capacity at Atlas. Atlas claims that there is no evidence that the summons and the complaint were conveyed to an authorized person of Atlas. Indeed, Atlas "absolutely denies that [Ms. Benoit's receipt] is somehow sufficient to infer actual notice on behalf of the corporation." *See* Atlas Brief, at 13.

Atlas, however, provides no affidavit to support its argument. The only affidavit Atlas has ever presented to this Court was that of Alain Dulude, legal counsel for Atlas. The Dulude Affidavit was attached to Atlas's Motion and Order to Set Aside Judgment. At that time, Mr. Dulude attested that he did not receive any notice of the default judgment. *See* Dulude Affidavit, at ¶ 14. Mr. Delude, however, is silent on the issue of whether Atlas received notice of the summons and the complaint. What the Delude Affidavit does indicate is that although Atlas did not specifically appoint or authorize Ms.

3. Also, Atlas's claim that the name of Burillo is unknown to Atlas is irrelevant in light of Ms. Benoit's relationship with Atlas.

Benoit to accept service of process, neither did it appoint or authorize any other employee to accept any service of process. *See id.* at ¶ 6.

Indeed, Atlas has never denied, nor does it now deny, that it did not receive the summons and the complaint. *See id.* Rather, Atlas merely argues that there was no actual notice because "there is no showing that any summons and complaint were conveyed to a director, officer, managing agent[,] or other authorized person' of Atlas." Atlas disregards the Ninth Circuit's finding that § 1608(b)(2) does not apply to this action. As such, an argument that Plaintiffs failed to serve a director, officer, managing agent, or other an authorized person is irrelevant. *See Straub,* 38 F.3d at 452-53.

Further, the only facts related to the issue of actual notice before the Ninth Circuit were that the summons and the complaint were sent, via registered mail, to Atlas and that C. Benoit signed the return receipt. Therefore, Atlas's argument that Plaintiffs failed to present any new facts to assist the Court in determining whether Atlas had actual notice is also flawed. The record clearly indicates that the facts regarding Ms. Benoit's job title, description, and capacity within Atlas are new evidence before the Court.

In essence, Atlas argues that the only way Plaintiffs can satisfy the burden of proof is to prove that Ms. Benoit physically conveyed the summons and the complaint to a particular person at Atlas. However, any information confirming that a particular person employed with Atlas physically received the summons and the complaint is solely within the control of Atlas. Such a burden cannot be satisfied without Atlas's cooperation. The burden of proving actual notice does not require Plaintiffs to accomplish a task so burdensome as to defy logic and common sense. *See Pope,* 485 U.S. at 489-90.

Under the circumstances, the Court finds that Plaintiffs have satisfied the burden of proof that they effected service by a method that was reasonably calculated to give actual notice to Atlas. The Court also finds that Atlas did not set forth any evidence to the contrary. Based on the facts and the circumstances presented, the Court finds that Plaintiff gave notice reasonably calculated to afford Atlas and opportunity to

respond to the lawsuit. *See Mullane,* 339 U.S. at 314. Therefore, the Court finds that Atlas had actual notice of the lawsuit in 1986.

CONCLUSION

For the forgoing reasons,

IT IS THEREFORE ADJUDGED that, in 1986, Defendant Atlas Turner, Inc. received actual notice of Plaintiffs' lawsuits of *Straub v. A.P. Green,* CIV-85-0431-PHX-SMM, *Conkwright v. A.C. & S, Inc.,* CIV-95-0133-PHX-SMM, and *Simburger v. Celotex Corp.,* CIV-85-0435-PHX-SMM.

IT IS HEREBY ORDERED the Clerk of the Court return this action to the Ninth Circuit Court of Appeals.

DATED this 16 day of May, 1995.

Stephen M. McNamee
United States District Judge

Copies to all counsel of record

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BERNARD F. SIMBERGER; ROXIE L. SIMBERGER, husband and wife,
Plaintiffs-Appellees,

v.

THE CELOTEX CORPORATION,
Defendant,

and

ATLAS TURNER, INC.,
Defendant-Appellant.

C.A. No. 94-15095

D.C. No. 85-00435-RCB

MEMORANDUM*

FILED
OCT 17 1994
Cathy A. Catterson, Clerk
U.S. Court of Appeals

Appeal from the United States District Court
for the District of Arizona
Robert C. Broomfield, Judge, Presiding

Submitted September 14, 1994**
San Francisco, California

Before: FARRIS and BEEZER, Circuit Judges, and McLAUGHLIN,*** District Judge

Appellants Celotex Corporation and Atlas Turner appeal the district court's denial of its motion to set aside a default judgment. Appellants contend that the district court lacked jurisdiction. The facts are nearly identical to those decided in *Straub v. A.P. Green, Inc. et al.*, No. 92-16204 slip op. ____, except that the return receipt was signed by "C. Benoit" and "Burello." The legal issues are identical to those decided in *Straub*. The Foreign Sovereign Immunities Act applies. Appellants have minimum contacts with the relevant geo-

* This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except as provided by Ninth Circuit Rule 36-3.

** The panel finds this case appropriate for decision without oral argument. Fed R. App. P. 34(a); 9th Cir. R. 34-4.

*** Hon. Linda Hodge McLaughlin, United States District Judge for the Central District of California, sitting by designation.

graphical area, the United States. Simberger substantially complied with the service of process requirements under § 1608(b)(3). We REMAND to determine whether appellants had actual notice of the complaint in 1986.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM F. CONKWRIGHT, HELEN CONKWRIGHT, husband and wife,
Plaintiffs-Appellees,

v.

A C & S, INC., a Pennsylvania corporation,
Defendant,

and

ATLAS TURNER, INC.,
Defendant-Appellant.

C.A. No. 94-15066

D.C. No. 85-00155-RMB

MEMORANDUM*

FILED
OCT 17 1994
Cathy A. Catterson, Clerk
U.S. Court of Appeals

Appeal from the United States District Court
for the District of Arizona
Richard M. Bilby, District Judge, Presiding

Submitted September 12, 1994**
San Francisco, California

Before: FARRIS and BEEZER, Circuit Judges, and McLAUGHLIN,*** District Judge

Appellants A C & S, Inc. and Atlas Turner appeal the district court's denial of its motion to set aside a default judgment. Appellants contend that the district court lacked jurisdiction. The legal issues are identical to those decided in *Straub v. A.P. Green, Inc. et al.,* No. 92-16204 slip op. ____. The Foreign Sovereign Immunities Act applies. Appellants have minimum contacts with the relevant geographical area, the United States. Conkwright substantially complied with the

* This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except as provided by Ninth Circuit Rule 36-3.

** The panel finds this case appropriate for decision without oral argument. Fed R. App. P. 34(a); 9th Cir. R. 34-4.

*** Hon. Linda Hodge McLaughlin, United States District Judge for the Central District of California, sitting by designation.

service of process requirements under § 1608(b)(3). We REMAND to determine whether appellants had actual notice of the complaint in 1986.

Harold E. STRAUB, et al.,
Plaintiffs-Appellees,

v.

A P GREEN, INC., et al., Defendants,

and

Atlas Turner, Inc., a foreign corporation,
Defendant-Appellant.

No. 92-16204.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Sept. 14, 1994.
Decided Oct. 17, 1994.

Retired worker brought action against Canadian company which produced asbestos, and default judgment was entered for worker. Producer moved to set aside judgment for lack of jurisdiction, and the United States District Court for the District of Arizona, Stephen M. McNamee, J., denied motion. Producer appealed, and the Court of Appeals, Farris, Circuit Judge, held that: (1) company which was fully owned by Crown Corporation of Province of Quebec was "foreign state" for purposes of Foreign Sovereign Immunities Act (FSIA); (2) FSIA applied to suit where defendant was "foreign state" even if party was not "foreign state" at time of alleged wrongdoing; (3) service of process in Canada under provisions of Hague Convention at time Canada was not signatory to convention did not constitute valid service under FSIA; (4) clause in FSIA allowing delivery to officer or agent only permitted service which occurred in United States; (5) substantial compliance was sufficient to establish process under FSIA by means reasonably calculated to give actual notice; and (6) instrumentality of foreign state was not "foreign state" for purposes of provisions of FSIA applicable to default judgments.

Remanded.

1. Federal Courts 776

Court of appeals reviews denial of motion to set aside judgment for lack of jurisdiction de novo.

2. Federal Courts 870.1

District court's findings of fact relevant to its determination of subject matter jurisdiction are reviewed for clear error.

3. International Law 10.30, 10.34

Foreign Sovereign Immunities Act (FSIA) applies to lawsuit brought against "foreign state," which includes agencies or instrumentalities of a foreign state. 28 U.S.C.A. § 1602.

See publication Words and Phrases for other judicial constructions and definitions.

4. International Law 10.34

Company which was fully owned by Crown Corporation of Province of Quebec was instrumentality of foreign state and was "foreign state" for purposes of Foreign Sovereign Immunities Act (FS1A). 28 U.S.C.A. § 1602.

5. International Law 10.30

Foreign Sovereign Immunities Act (FSIA) is applicable where defendant in lawsuit is "foreign state" under Act at time suit is filed, even if party was not "foreign state" at time of alleged wrongdoing. 28 U.S.C.A. § 1602.

6. International Law 10.34

Foreign Sovereign Immunities Act (FSIA) applied to lawsuit against company owned by Crown Corporation of Province of Quebec at time suit was filed, notwithstanding fact that company was not owned by Crown Corporation and was not "foreign state" at time of alleged wrongdoing giving rise to suit. 28 U.S.C.A. § 1602.

7. International Law 10.43

Service of process in Canada on defendant which was "foreign state" which complied with provisions of Hague Convention did not constitute valid service of process under Foreign Sovereign Immunities Act (FSIA) where at time of service Canada had not yet become signatory to Hague Convention. 28 U.S.C.A. § 1608(b)(2).

8. Statutes 188

When interpreting statute, court ordinarily first looks to plain meaning of language used by Congress.

9. Statutes 217.4

Where statute is ambiguous, court consults legislative history, to extent it is of value, to aid in interpretation.

10. International Law 10.43

Clause in provision governing service of process under Foreign Sovereign Immunities Act (FSIA) which provides that service may be effected by "delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States" only authorizes service of process which occurs in United States. 28 U.S.C.A. § 1608(b)(2).

11. International Law 10.43

Service of process is valid under provision of Foreign Sovereign Immunities Act (FSIA) allowing process to be served in manner reasonably calculated to give actual notice by delivery of copy of summons and complaint along with translation into official language of foreign state where party substantially complies with provision. 28 U.S.C.A. § 1608(b)(3).

12. International Law 10.43

In applying "substantial compliance" test to determine whether process has been validly served under Foreign Sover-

eign Immunities Act (FSIA), pivotal factor is whether defendant receives actual notice and was not prejudiced by lack of compliance with FSIA. 28 U.S.C.A. § 1608(b)(3).

See publication Words and Phrases for other judicial constructions and definitions.

13. International Law 10.43

Failure to deliver complaint in correct language is fundamental defect that fails both "strict compliance" and "substantial compliance" tests for services of process by means reasonably calculated to give actual notice under Foreign Sovereign Immunities Act (FSIA). 28 U.S.C.A. § 1608(b)(3).

14. International Law 10.43

Failure of party to dispatch complaint by clerk of court when seeking to obtain service of process by means reasonably calculated to give actual notice under Foreign Sovereign Immunities Act (FSIA) did not constitute lack of substantial compliance with statute and did not deprive district court of jurisdiction over defendant on whom process was served. 28 U.S.C.A. § 1608(b)(3).

15. International Law 10.43

Burden of proving that party on whom service of process was sought to be obtained by means reasonably calculated to give actual notice under Foreign Sovereign Immunities Act (FSIA) received actual notice of suit was on party bringing suit. 28 U.S.C.A. § 1608(b)(3).

16. International Law 10.43

Fact that attorneys for foreign defendant on whom service of process was sought by means reasonably calculated to give actual notice under Foreign Sovereign Immunities Act (FSIA) contacted district court about status of case prior to entry of default judgment was insufficient to establish that defendant had actual notice of complaint where contact with court occurred over four years after service was sought and

was not inconsistent with claim by defendant that it did not have notice of summons and complaint at time service was sought. 28 U.S.C.A. § 1608(b)(3).

17. Federal Courts 922

Court of Appeals remanded appeal from dismissal of action by district court on basis that jurisdiction over foreign defendant under Foreign Sovereign Immunities Act (FSIA) had not been obtained by proper service of process where issue of whether foreign defendant had had actual notice of summons and complaint was unresolved and actual notice was not dispositive issue before district court. 28 U.S.C.A. § 1602.

18. International Law 10.34, 10.42

Term "foreign state" as used in Foreign Sovereign Immunities Act (FSIA) includes instrumentalities of foreign states except as used in section of Act governing default judgments against foreign states. 28 U.S.C.A. § 1608(e).

19. Statutes 217.4

Resort to legislative history is not necessary when language of statute is not ambiguous.

20. International Law 10.34

Canadian corporation which was owned by Crown Corporation of Province of Quebec was not "foreign state" for purposes of provision in Foreign Sovereign Immunities Act (FSIA) regarding default judgments and was not required to be served with copy of default judgment against it. 28 U.S.C.A. § 1608(e).

Paul W. Holloway & Kevin B. Sweeney, Holloway, Odegard & Sweeney, Phoenix, AZ, for defendant-appellant, Atlas Turner, Inc.

Robert George Begam, Dena Rosen Epstein, Begam, Lewis, Marks, Wolfe & Dasse, Paul A. Jozef, Phoenix, AZ, for plaintiffs-appellees, Harold E. Straub, et al.

Appeal from the United States District Court for the District of Arizona.

Before: FARRIS, BEEZER, Circuit Judges, and McLAUGHLIN*, District Judge.

FARRIS, Circuit Judge.

Atlas Turner appeals the district court's denial of its motion to set aside a default judgment. Atlas Turner contends that the district court lacked jurisdiction because service of process was not effective under the Foreign Sovereign Immunities Act. We have jurisdiction of the timely appeal under 28 U.S.C. § 1291. We remand to determine whether Atlas Turner had actual notice in 1986 of the complaint.

I. BACKGROUND

[1, 2] Plaintiff Harold Straub sued Atlas Turner for asbestos-related injuries. He claims his injuries were caused by exposure to Atlas Turner's products in Arizona (from 1967 to 1968) and in Illinois (from 1948 to 1959) while he was employed by Armstrong Contracting & Supplying Company. He mailed a copy of the summons and complaint in the English language by registered mail, return receipt requested, to Atlas Turner in Montreal, Quebec, Canada. The mail receipt was signed by "C. Benoit" and returned to Straub.

Atlas Turner did not respond to the suit. A default judgment was entered against it on April 1, 1991. Atlas Turner's motion to set aside the judgment for lack of jurisdiction was denied by the district court on May 27, 1992. Atlas appeals. We review *de novo Nike, Inc. v. Comercial Iberica de Exclusivas Depotivas, S.A.*, 20 F.3d 987, 990 (9th Cir.1994). The district court's findings of fact relevant to its determination of subject matter jurisdiction are reviewed for clear error. *Id.*

II. APPLICABILITY OF FOREIGN SOVEREIGN IMMUNITIES ACT

[3, 4] To determine whether Straub's service of process was effective, we must initially decide whether the Foreign

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* The Honorable Linda Hodge McLaughlin, United States District Judge for the Central District of California, sitting by designation.

Sovereign Immunities Act applies. The FSIA applies to lawsuits against "foreign states." 28 U.S.C. § 1602. The term foreign state includes an "agency or instrumentality of a foreign state."[1] The facts are undisputed. At the time Straub filed his lawsuit, Atlas Turner was fully owned by Societe Nationale de L'Amiante, a Crown Corporation of the Province of Quebec. It was therefore an instrumentality of a foreign state. It is not disputed that Atlas Turner was not a foreign state at the time Straub was exposed to the asbestos.

[5, 6] Straub contends that the FSIA does not apply because Atlas Turner was not an instrumentality of Quebec at the time of the acts giving rise to this lawsuit. We reject the argument. Without directly addressing the issue, we have applied the FSIA to cases in which foreign governments acquired control over private entities after the conduct underlying the lawsuit has occurred. *See West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 823 (9th Cir.), *cert. denied*, 482 U.S. 906, 107 S.Ct. 2483, 96 L.Ed.2d 375 (1987). In *Wolf v. Banco Nacional de Mexico, S.A.*, 739 F.2d 1458, 1460 (9th Cir.1984), *cert. denied*, 469 U.S. 1108, 105 S.Ct. 784, 83 L.Ed.2d 778 (1985), the court went even further, and implied that the FSIA may be applicable if a party that becomes a "foreign state" after the commencement of a lawsuit promptly brings its status as a "foreign state" to the district court's attention.

Straub's reliance on cases from other circuits does not support his argument. The Sixth and Eighth Circuits have held that the FSIA is applicable where a defendant is a foreign state at the time of the alleged wrongdoing. *See General Elec. Capital Corp. v. Grossman*, 991 F.2d 1376 (8th Cir. 1993); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445 (6th

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1. An "agency or instrumentality of a foreign state" is defined in subsection (b) as any entity—

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(b).

Cir.1988). Neither court addressed the issue of whether the FSIA applies when a party is not a foreign state at the time of the alleged wrongdoing but becomes one prior to the date on which the lawsuit is filed. Straub's argument derives some support from *In re Chase & Sanborn Corp. v. Granfinanciera,* 835 F.2d 1341, 1347-48 (11th Cir.1988), *reversed on other grounds,* 492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989), where the court held that the defendant "was not an instrumentality of the Colombian government at the time of the transactions and thus would not be protected by the provisions of FSIA." However, in *Granfinanciera* the court also took into account the fact that the plaintiffs filed their lawsuit *before* the defendant was nationalized by the Colombian government. *See id.* at 1347 ("FSIA is inapplicable to the case at bar because the transfers in question *and the suit to recover those transfers* occurred before Granfinanciera was nationalized.") (emphasis added). Unlike *Granfinanciera*, Straub filed his lawsuit *after* Atlas became a "foreign state." Straub has cited no precedent holding that a party that is a foreign state when the litigation commences is not entitled to the protections of the FSIA. We have found none. We hold that the FSIA applies when a party is a foreign state at the time the lawsuit is filed, even if that party was not a foreign state at the time of the alleged wrongdoing.

III. SERVICE OF PROCESS REQUIREMENTS UNDER THE FSIA

If the FSIA is applicable, Atlas Turner recognizes that it is not entitled to immunity from suit because one of the exceptions to foreign sovereign immunity in § 1605 applies. It also recognizes that it has minimum contacts with the relevant geographical area, the United States. *Meadows v. Dominican Republic,* 817 F.2d 517, 523 (9th Cir.) (relevant geographical area for evaluating a party's contacts under the FSIA is "the entire United States, not merely [the forum state]"), *cert. denied,* 484 U.S. 976, 108 S.Ct. 486, 98 L.Ed.2d 485 (1987). Atlas Turner argues instead that we should set aside the

default judgment because Straub did not properly serve Atlas Turner with either the summons and complaint or a copy of the default judgment.

A. Service of the Summons and Complaint

1. Service under § 1608(b)(2).

[7] Section 1608(b)(2) provides that if no special arrangement for service between the parties exists, service may be effected by

> delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents.

The district court ruled that Straub had complied with the service requirements of § 1608(b)(2). The basis for the court's ruling was that (1) Atlas was served in accordance with the Hague Convention and (2) both Canada and the United States are signatories to the Hague Convention. Canada, however, did not become a signatory to the Hague Convention until May 1, 1989[2]; Atlas was allegedly served in 1986. Thus, the district court's ruling cannot be affirmed on the basis of compliance with the Hague Convention.

Straub asserts that service was effected in compliance with the first clause of § 1608(b)(2). He contends that the phrase "any other agent authorized by appointment or by law to receive service of process in the United States" refers to a class of agents who have the general authority to receive service of process in the United States but who are not necessarily in the United States at the time they are served.

[8-10] Although Straub's interpretation of the statute is certainly plausible, it is also plausible that Congress meant for the modifying phrase "in the United States" to apply to the "by delivery" language. When interpreting a statute, we ordinarily first look to the plain meaning of the language used by

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2. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, May 1, 1989, Treaty Series, No 2, Canada, 1989.

Congress. *See Whilshire Westwood Assocs. v. Atlantic Richfield,* 881 F.2d 801, 803 (9th. Cir.1989). But if the statute is ambiguous, we consult the legislative history, to the extent that it is of value, to aid in our interpretation. *Stanton Rd. Assocs. v. Lohrey Enters.,* 984 F.2d 1015, 1019 (9th Cir.1993). Because of the ambiguity in the plain meaning of the language, we examine the legislative history and the structure of § 1608. The House Report makes abundantly clear that "subsection (b)(2) . . . provides for service upon . . . agents in the United States of the agency or instrumentality." *See* 1976 U.S.Code Cong. & Ad.News 6604, 6624. Further, § 1608(b)(3), which applies if service cannot be made under subsections (b)(1) and (b)(2), establishes a procedure for serving an instrumentality of a foreign state in a foreign country. One of the requirements of § 1608(b)(3) is that a copy of the complaint be translated into the official language of that country. *See* 28 U.S.C. § 1608(b)(3). The translation requirement in § 1608(b)(3) would have little meaning if parties could circumvent it by claiming they served an "authorized agent" in the foreign country pursuant to § 1608(b)(2).

Thus, we hold that the first clause of § 1608(b)(2) only authorizes service of process in the United States. Straub did not serve an authorized agent in the United States, and therefore service of process was not effective under § 1608(b)(2).

2. Service under § 1608(b)(3)

Straub also contends that he properly served Atlas under § 1608(b)(3). That section provides that if service cannot be made under subsections (b)(1) and (b)(2), service can be effected

> if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—
>
> . . .
>
> (B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentally to be served. . . .

28 U.S.C. § 1608(b)(3).

Straub did not strictly comply with section 1608(b)(3). Although Straub wrote his complaint in English, one of the official languages of Canada[3], the complaint was not dispatched by the clerk of the court. Thus, we must decide whether Straub's failure to have the complaint dispatched by the clerk of the court renders service ineffective.

[11, 12] Courts in other circuits have rejected a strict reading of § 1608(b)(3), and have upheld service where the serving party "substantially complied" with the FSIA, even though the complaint was neither translated nor dispatched by the clerk of the court. *See Sherer v. Construcciones Aeronauticas, S.A.*, 987 F.2d 1246 (6th Cir.) (omission of translation of complaint did not warrant dismissal), *cert. denied*, —— U.S. ——, 114 S.Ct. 72, 126 L.Ed.2d 41 (1993); *Banco Metropolitano v. Desarrollo de Autopistas y Carreteras de Guatemala*, 616 F.Supp. 301, 304 (S.D.N.Y. 1985) (complaint not translated and not dispatched by clerk); *Obenchain Corp. v. Corporation Nacionale de Inversiones*, 656 F.Supp. 435 (W.D.Pa.1987) (complaint not dispatched by clerk of court). When applying the substantial compliance test, the pivotal factor is whether the defendant receives actual notice and was not prejudiced by the lack of compliance with the FSIA. *See id.; see also Harris Corp. v. National Iranian Radio and Television*, 691 F.2d 1344 (11th Cir.1982); *Velidor v. L/P/G Benghazi*, 653 F.2d 812 (3d Cir.1981), *cert. dismissed*, 455 U.S. 929, 102 S.Ct. 1297, 71 L.Ed.2d 474 (1982). Atlas Turner erroneously contends that courts upholding service based on substantial compliance with the FSIA have required a showing of "exigent" circumstances. Although exigent circumstances were present in *Harris* (the Iranian revolution), they were absent in both *Sherer* and *Banco Metropolitano*, the two most analogous cases. Similarly, in the context of the Federal Rules of Civil Procedure we have held that "substantial compliance" with the service requirements of Rule 4 is sufficient so long as the opposing party

3. The official languages of Canada are English and French. Can. Const. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 16. Moreover, the Canadian Constitution provives that either French or English may be used in the courts of Quebec. Can. Const. (British North America Act, 1867), § 133.

receives sufficient notice of the complaint. *See Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1404 (9th Cir.1994); *Direct Mail Specialists, Inc. v. Eclat Computerized Technologies, Inc.*, 840 F.2d 685, 688 (9th Cir.1988).

[13] We formally adopt a substantial compliance test for the FSIA. This holding is consistent with our recent decision in *Gerritsen v. Consulado General de Mexico*, 989 F.2d 340, 345 (9th Cir.1993), *cert. denied*, —— U.S. ——, 114 S.Ct. 95, 126 L.Ed.2d 62 (1993). In *Gerritsen* we held that a plaintiff failed to perfect service under § 1608(a)(3) because he did not serve the Mexican Consulate with a Spanish translation of the complaint. Failure to deliver a complaint in the correct language is such a fundamental defect that it fails both a "strict compliance" test and a "substantial compliance" test.

[14, 15] Applying the substantial compliance test, Straub's failure to dispatch the complaint by the clerk of the court did not per se deprive the district court of jurisdiction. The substantial compliance test, however, is satisfied only if Atlas Turner received actual notice of the lawsuit. The burden of proving actual notice remains with Straub. *See Hirsch v. Blue Cross, Blue Shield*, 800 F.2d 1474, 1477 (9th Cir.1986) (stating that plaintiff has the burden of establishing jurisdiction).

[16] The summons and complaint were received on September 22, 1986, at Atlas Turner's corporate headquarters and signed for by "C. Benoit." The district court concluded that Atlas Turner had actual notice of the summons and complaint because Atlas Turner's attorneys contacted the district court about the status of the case prior to the entry of default judgment on April 1, 1991. This is insufficient to establish actual notice. We recognize that the district court could have taken judicial notice of communications between it and Atlas Turner's attorneys under Federal Rule of Evidence 201. However, Rule 201 requires that a "judicially noticed fact must be one not subject to a reasonable dispute in that it is . . . (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The only "source" to which we could turn to verify the accuracy of the district court's statement that it received communications from Atlas Turner's attorneys prior to April 1, 1991, is the district

judge himself. The problem with the court's conclusion is that Atlas Turner's contacts with the court prior to April 1991 are not inconsistent with Atlas Turner's claims that it had no notice of the summons and complaint mailed *in 1986.* That Atlas Turner contacted the court in 1990 or 1991 indicates only that it became aware of the default proceedings at some time prior to its contact. This falls far short of a showing of actual notice of the complaint mailed in 1986. By 1990, the deadline for filing an answer to Straub's complaint had long since passed.

[17] Straub has not satisfied his burden of proving actual notice. Because actual notice was not the dispositive issue before the district court, however, we remand for further consideration of the issue. In so doing we do not ignore the fact that service "by clerk of the court" would have probably resulted in a proper return of service. Straub's problem with proof, if any, is of his own making.

B. Service of a copy of the default judgment

Atlas Turner contends that it was not served with a copy of the default judgment pursuant to § 1608(e) of the FSIA. Section 1608(e) provides:

> No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner described for service in this section.

The district court held that Straub was not required to serve notice of the default judgment on Atlas Turner. The court noted that the second sentence of § 1608(e), which requires service of a copy of the default judgment, refers only to a "foreign state or political subdivision," whereas the first sentence of § 1608(e) refers to "a foreign state, a political subdivision thereof *or* an agency or instrumentality of a foreign state." The court reasoned that Atlas Turner was not entitled

to service of the default judgment because the second sentence of § 1608(e) makes no reference to an "instrumentality of a foreign state."

[18-20] We agree. Section 1603(a) makes clear that the term foreign state includes instrumentalities of foreign states *except as used in section 1608.* 28 U.S.C. § 1603(a). Thus, when the term foreign state is used in § 1608, it does not encompass instrumentalities of foreign states. *But see LeDonne v. Gulf Air, Inc.*, 700 F.Supp. 1400, 1414 (E.D.Va.1988) (setting aside default judgment partly on the basis of plaintiff's failure to serve instrumentality of foreign state with copy of default judgment). Although Atlas Turner's argument gains some support from the legislative history, resort to the legislative history is not necessary when the language of the statute is not ambiguous. *See Brooker v. Desert Hosp. Corp.*, 947 F.2d 412, 414 (9th Cir.1991). Atlas Turner did not need to be served with a copy of the default judgment.

IV. CONCLUSION

We hold that Straub's faiure to dispatch the summons and complaint by the clerk of the court did not per se deprive the district court of jurisdiction, but we REMAND for a determination of whether Atlas Turner had actual notice of the complaint in 1986. If not, the matter is at an end. If so, the default was proper and judgment may enter. Each side shall pay its own costs.

REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BERNARD F. SIMBURGER and ROXIE L. SIMBURGER, husband and wife, *Plaintiff,* vs. THE CELOTEX CORPORATION, et al., *Defendants.*	**FILED** **DEC 07 1993** Clerk US District Court District of Arizona By [Initials] Deputy No. CIV 85-435 PHX RCB ORDER

Defendant Atlas Turner, Inc. has filed a motion pursuant to Rule 60(b)(4), Federal Rules of Civil Procedure, to vacate a default judgment entered by this court against Atlas on March 3, 1988. Atlas contends that the judgment entered by the court is void due to the court's lack of personal jurisdiction over Atlas. Plaintiffs Bernard and Roxie Simburger have filed a response to Atlas' motion. Atlas Turner filed an untimely reply just after the court heard oral argument on November 15, 1993. After considering the parties' written and oral arguments, the court now rules.

BACKGROUND

A short synopsis of the significant events in this case is sufficient for purposes of deciding defendant's motion to vacate. On February 13, 1985, Bernard Simburger filed a complaint in this court against Atlas Asbestos Company, which was the predecessor of Atlas Turner, Inc. On September 9, 1986, plaintiffs filed an amended complaint, naming Atlas-Turner, Inc. as a defendant. Although Atlas Turner argues to the contrary, evidence submitted in the Simburgers' response establishes that the amended complaint was served on Atlas Turner on September 22, 1986. Individuals named C. Benoit and Burelle signed a return receipt on Atlas Turner's behalf.

On October 30, 1985, this case was consolidated with four other asbestos cases, including *Straub v. A. P. Green Inc.,* CIV

85-431 PHX CLH. On March 8, 1988, this court entered default judgment against Atlas Turner in favor of the Simburgers in the amount of $75,000. Plaintiffs served a copy of the default judgment upon Atlas Turner's counsel by letter dated June 7, 1993.

Atlas Turner has filed a motion contending that the judgment entered by the court is void and, therefore, should be vacated. In its motion, Atlas Turner makes the following arguments:

> (1) that the Foreign Sovereign Immunities Act (the FSIA) applies to this case and that the service requirements of the FSIA were not met either with respect to service of the complaint or with respect to service of the notice of the default judgment;
>
> (2) that because the service requirements of the FSIA were not met, the default judgment is void;
>
> (3) that if the FSIA does not apply to this case, the judgment nevertheless is void because Atlas Turner did not and does not have sufficient minimum contacts with Arizona to allow the court to exert jurisdiction; and
>
> (4) that the record does not contain sufficient evidence to conclude that the Simburgers effected sufficient service of process on a person authorized to accept service on behalf of Atlas Turner.

Thus, Atlas Turner argues the default judgment entered against it must be regarded as void regardless of whether the FSIA applies to this case.

Many of the arguments raised by Atlas Turner in this case were raised and rejected in an order issued by another judge of this court in the *Straub* case. The complaints in both *Straub* and *Simburger* alleged that the plaintiffs had been exposed to Atlas asbestos products while working at the Shell Oil Refinery in Illinois, and while working for A, C & S in Phoenix, Arizona, at the Swift packing plant. In both *Straub* and *Simburger,* the plaintiffs served amended complaints upon Atlas Turner at the same address (apparently at the same time) and

both complaints were signed for by a C. Benoit on Atlas Turner's behalf. In both cases, Atlas never answered the complaint until after default judgment was entered.

Prior to filing its motion to vacate in this case, Atlas Turner moved to vacate the default judgment against it in *Straub*. In its motion, Atlas Turner argued (1) that the FSIA applies to Atlas Turner and Atlas has immunity thereunder; (2) that plaintiffs failed to serve the complaint and default judgment properly as required by the FSIA; (3) that if the FSIA does not apply, service still was improper; and (4) if the FSIA does not apply, Atlas Turner's contacts with Arizona are insufficient to establish personal jurisdiction. All these arguments are reurged in *Simburger*.

DISCUSSION

The parties' papers provide extensive discussion regarding whether the Simburgers indeed complied with the FSIA and whether this court would have jurisdiction over Atlas Turner if the FSIA does not apply. The Simburgers, however, also argue that the court's ruling in *Straub* precludes Atlas Turner from rearguing the service of process and personal jurisdiction issues resolved by the court in *Straub*. Because the court finds the Simburgers' issue preclusion argument to be persuasive, the court finds it unnecessary to reach the merits of Atlas Turner's motion.

I. ISSUE PRECLUSION

Under the doctrine of issue preclusion, once an issue is actually and necessarily decided by a court, the determination on that issue is binding in subsequent suits against a party to the initial litigation. *See, e.g., Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979). The doctrine of issue preclusion forecloses relitigation of an issue if: (1) the issue at stake is identical to the issue raised in the prior litigation; (2) the issue was actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation was a necessary part of the judgment in that action. *Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1320 (9th Cir. 1992).

A. *Identity of Issues*

The issue of whether Straub properly served Atlas Turner pursuant to the requirements of the FSIA was presented to the court in that case. Although this case involves service by a different plaintiff, the factual circumstances and legal inquiry is identical. Both plaintiffs, through the same process server, served Atlas Turner via registered mail. The amended complaints in both cases were served on Atlas Turner and signed by C. Benoit on the same date in 1986. Thus, the service of process issue in *Simburger* and *Straub* is virtually identical.

The *Straub* court, after determining that the FSIA applied to Atlas Turner, determined that Straub had served Atlas Turner in compliance with the FSIA. Specifically, the court held that service was proper under both section 1608(b)(2) and section 1608(b)(3). *See* Order of 5/27/92 at 22-24.

Atlas Turner argues that the issue in this case differs from that presented in the *Straub* case because the court in *Straub* noted that Atlas Turner had actual notice of the litigation. The court does not find this alleged distinction between the two cases to be material for issue preclusion purposes. Given that the *Straub* and *Simburger* amended complaints were mailed together, received the same day, and signed for by the same person, the court has significant doubt that Atlas Turner did not have actual notice of the *Simburger* case. Atlas Turner in its motion erroneously asserts that "[a]t no time have the Simburgers served the Amended Complaint on Atlas Turner." Mot. at 3. This assertion, however, is incorrect, and Atlas Turner has made no other effort to explain why it did not have actual notice of this lawsuit. Moreover, even assuming that Atlas Turner had submitted some evidence in this case that they did not have actual notice of the litigation, the outcome would be the same. The *Straub* court expressly found that service upon Atlas Turner met the requirements of the FSIA; that Atlas Turner had actual notice of the litigation simply was an alternative reason for rejecting Atlas Turner's motion to vacate judgment. The *Straub* court's holding that service of process was proper, by itself, is sufficient to decide the issue before this court.

Atlas Turner also argues that the default judgment against it in this case is void because the Simburgers allegedly did not properly serve the default judgment. Atlas Turner made this same argument in *Straub*, and the court rejected the argument. Order of 5/27/92 at 24-25.

Atlas Turner makes some arguments in this case that it apparently did not make in *Straub*. For example, Atlas Turner did not argue in *Straub* that service of process was improper under section 1608(b)(3) because the papers served had not been translated into French. The doctrine of issue preclusion, however, bars arguments raised for the first time in the second litigation if the arguments could have been raised in the first. *See, e.g., Laaman v. United States,* 973 F.2d 107, 112 (2d Cir. 1992), *cert. denied,* 113 S. Ct. 1368 (1993); *Yamaha Corp. of Am. v. United States,* 961 F.2d 245, 254, 257-58 (D.C. Cir. 1992), *cert. denied,* 113 S. Ct. 1044 (1993); 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4417, at 121 (Supp. 1992). Atlas Turner makes no attempt to explain why any of the new arguments it raises in this case could not have been raised in *Straub*. Thus, Atlas Turner is precluded from raising the new arguments in its motion.

B. *Actually Litigated*

"When an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated." Restatement (Second) of Judgments § 27 cmt. d (1982). The issues addressed by the *Straub* court were raised by motion, submitted for determination, and ruled upon by the court. The requirement that the issues be actually litigated, therefore, is satisfied.

. . .

C. *Necessary to the Judgment*

Atlas Turner does not argue in its papers that the *Straub* court's ruling on the service of process issue was somehow unnecessary to that court's ultimate ruling. Given that the *Straub* court found that the FSIA applied to Atlas Turner, the court's ruling that service of process under the FSIA was proper was necessary to its decision. Thus, the third of the three requirements of issue preclusion is satisfied.

D. *The Appeal in Straub*

At oral argument, counsel for both parties informed the court that the *Straub* decision currently is on appeal before the United States Court of Appeals for the Ninth Circuit. The rule in the federal courts is that a final judgment retains its full preclusive effect pending appeal and that, therefore, the preclusive effect of a district court judgment is not affected by an appeal. *E.g., Robi v. Five Platters, Inc.,* 838 F.2d 318, 327 (9th Cir. 1988); 18 Wright, Miller & Cooper, *supra,* § 4433, at 308 (1981 & Supp. 1992) (collecting cases). That Atlas Turner has appealed the court's ruling in *Straub* is, therefore, irrelevant for present purposes.

II. CONCLUSION

The question of whether service of process upon Atlas Turner pursuant to the FSIA was proper in *Straub* is not materially distinguishable to the issue as it arises in this case. The *Straub* court concluded that service under the FSIA was proper, and Atlas Turner has presented this court no sufficient reason why the issues in this case are different than they were in *Straub* or why the court otherwise should not accord preclusive effect to the *Straub* court's decision. Atlas Turner had the same incentive to litigate the issue in *Straub* as it does before this court. The court, therefore, perceives no good reason to revisit the issue.

IT IS ORDERED denying Atlas Turner's motion to vacate default judgment.

IT IS FURTHER ORDERED denying as moot Atlas Turner's motion to stay discovery pending resolution of its motion to vacate.

DATED this 3 day of December, 1993.

Robert C. Broomfield
United States District Judge

Copies to counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

WILLIAM E. CONKWRIGHT and HELEN CONKWRIGHT, husband and wife, *Plaintiffs,*	)	No. CIV 85-155 TUC RMB
	)	**ORDER**
v.	)	**FILED**
	)	**NOV 16 1993**
A.C. & S., INC., et al., *Defendants.*	)	Clerk US District Court
	)	District of Arizona
	)	By [Initials] Deputy

Before the Court are defendant Atlas Turner Inc.'s ("Atlas-Turner") Motion to Set Aside Default Judgment, filed on July 30, 1993 and Motion to Stay Discovery, filed August 13, 1993.

Procedural Background

Pursuant to Federal Rule of Civil Procedure 15(a), plaintiffs William F. Conkwright and Helen Conkwright filed their First Amended Complaint on August 14, 1986 naming Atlas-Turner as a defendant. On February 28, 1988 this Court found that Atlas-Turner was duly and regularly served with process and that the time for appearance and answer or other pleading by Atlas-Turner had expired. Accordingly, this Court entered a default judgment against Atlas-Turner. On August 3, 1993 Atlas-Turner moved to set aside the default judgment.

Discussion

I. Timeliness of Motion to Set Aside Default Judgment

Atlas-Turner moves to set aside a default judgment under **Fed.R.Civ.P.** 60(b)(4). Plaintiffs contend that Atlas-Turner's Rule 60(b) motion should be denied because it was not made within a reasonable time.

Rule 60(b)(4) provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void.

The rule requires that a 60(b)(4) motion "be made within a reasonable time," but if a judgment is void, a motion to set it aside may be brought at any time. *In Re Center Wholesale, Inc.,* 759 F.2d 1440, 1447-48 (9th, Cir. 1985), *citing* **11C Wright & A. Miller, Federal Practice and Procedure** § 2862 at 197 (1973). Therefore, Atlas-Turner's delay in bringing its Rule 60(b)(4) motion is irrelevant and the motion is timely.

II. Default Judgment Is Not Void

"A judgment is void only if the court that rendered judgment lacked jurisdiction of the subject matter, or of the parties, or if the court acted in a manner inconsistent with due process of law." *In Re Center Wholesale,* 759 F.2d at 1448, citing **11C Wright & A. Miller, Federal Practice and Procedure** § 2862 at 198-200 (1973). Atlas-Turner invokes Rule 60(b)(4) on the basis that the default judgment is void for lack of personal jurisdiction. Atlas-Turner has set forth two arguments to defeat personal jurisdiction: (1) plaintiffs did not comply with the service requirements of the Foreign Sovereign Immunities Act ("FSIA"), or, alternatively, Rule 4 of the Federal Rules of Civil Procedure; and, (2) if the FSIA does not apply, Atlas-Turner lacks sufficient minimum contacts with the State of Arizona.

After a review of the pleadings, the Court finds that jurisdiction exists and service of process was adequate for the reasons set forth in United States District Judge Stephen M. McNamee's Memorandum and Order, filed May 27, 1992, in *Straub v. A.P. Green, Inc.,* CIV 85-431 PHX SMM (order denying Atlas-Turner's motion to set aside default judgment for lack of jurisdiction).

Conclusion

Accordingly, **IT IS HEREBY ORDERED** that Atlas-Turner's motion to set aside default judgment is **DENIED. IT IS FURTHER ORDERED** that Atlas-Turner's motion to stay discovery is **DENIED as moot.**

Dated: This 12th day of November, 1993.

Richard M. Bilby
United States District Judge

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

HAROLD E. STRAUB, et ux., *Plaintiffs,*	No. CIV 85-431 PHX SMM
	MEMORANDUM AND ORDER
v.	
	FILED
A.P. GREEN, INC., et al., *Defendants.*	**MAY 27 1992** Clerk US District Court District of Arizona By [Initials] Deputy

On May 7, 1991 Defendant Atlas-Turner, Inc. (Atlas) filed a motion to set aside the default judgment entered against it on April 1, 1991. Atlas contends the Court lacks jurisdiction over it. The Court granted the parties time to conduct discovery related to the jurisdictional issues. The Plaintiffs filed a response and motion for sanctions on February 4, 1992. Atlas filed a reply in support of its motion, a response to the Plaintiffs' motion for sanctions, and a revised version of the original motion on February 25, 1992. Atlas filed a supplemental reply on March 10, 1992, and a second supplemental reply on March 18, 1992. Even though the authority Atlas cited in its supplemental replies was available at the time Atlas filed its reply, and even though Atlas offered additional argument along with the supplemental authority, the Court has considered all of the briefing papers filed by both sides.

Atlas contends the Court lacks personal jurisdiction over it because it has not had sufficient contacts with Arizona to support the exercise of personal jurisdiction. In addition, Atlas contends the Foreign Sovereign Immunities Act (FSIA) deprives the Court of jurisdiction because Atlas, as a wholly-owned subsidiary of a foreign government entity, (1) is immune from suit under the FSIA, and (2) was not properly served with notice of the action and notice of default under the FSIA.

Atlas is a Canadian corporation. It conducts manufacturing operations in Canada. Atlas contends it has not done business within the State of Arizona, has not registered with the

Arizona Corporation Commission, has not maintained any bank accounts in Arizona, has not been listed in any Arizona telephone directory, and has not initiated any lawsuit in Arizona. In addition, Atlas contends it made all of its shipments F.O.B. Montreal, Quebec, Canada, and has received all payments due on sales in Montreal. Atlas offers the affidavit of Alain Dulude, its legal counsel, in support of the above allegations. Interestingly, the Dulude affidavit does not contain any allegations regarding whether Atlas shipped asbestos products F.O.B. Montreal to Arizona or whether Atlas expected its products to reach Arizona. Cf. *Dapkuna v. A. C. and S. Co.*, 1986 WL 561, *1 (E.D.Pa. 1986); *In re Conn. Asbestos Litig.*, 677 F. Supp. 70, 74 (D. Conn. 1986).

Atlas formerly operated under the name Atlas Asbestos Company, Ltd. It became Atlas-Turner, Inc. in 1979. Societe Nationale de l'Amiante (SNA), a Crown Corporation of the Province of Quebec, acquired Atlas on May 19, 1980 by purchasing all of Atlas' shares.

In *McDaniel v. Armstrong World Industries,* 603 F. Supp. 1337 (D.D.C. 1985), the court discussed the origins of Atlas-Turner, Inc. in great detail:

> Turner & Newell was formed in 1920 through a merger of several United Kingdom manufacturers of asbestos-containing products, one of which was J.W. Roberts, Ltd. J.W. Roberts continued to function as a branch of T & N. In 1934, T & N acquired Atlas Asbestos Co., a Canadian corporation. In 1936, T & N completed the acquisition of Keasbey and Mattison Company ("K & M"), located in Ambler, Pennsylvania. Keasbey and Mattison owned Bell Mine in Thetford, Quebec. In 1937, T & N formed a wholly-owned subsidiary, Bell Asbestos Mines, Ltd., for the purpose of acquiring Bell Mine.
>
> By 1950, Keasbey and Mattison was manufacturing a wide range of asbestos-containing products. By that same year, T & N's distribution chain was so firmly entrenched that T & N informed its shareholders that Keasbey and Mattison distributors:
>
> > now embrace all the major trading areas of the nation, and serve to place the various Keasbey and

> Mattison products virtually at the doorsteps of retailers and ultimate users throughout the United States.

Turner & Newell brochure at 39. . . .

In the 1930's, J.W. Roberts, a company for which T & N does not deny responsibility, developed a product known as Sprayed Limpet Asbestos. The manufacturing process took place in England and the product was distributed through a series of exclusive license agreements. Initially, J.W. Roberts granted Keasbey and Mattison the right to distribute Limpet in the United States. In the late 1950's, Keasbey and Mattison entered into a sublicensing agreement with National Asbestos Co. ("National"), one of the companies for which [the plaintiff] worked, for the Sprayed Limpet Asbestos process. National's territory under this agreement included the District of Columbia, and under this agreement, National regularly applied Sprayed Limpet Asbestos in buildings located in the District of Columbia.

In 1962, after selling Keasbey and Mattison, T & N, through J.W. Roberts, granted Armstrong Contracting and Supply Company an exclusive license for the Sprayed Limpet Asbestos process in the United States. Armstrong entered into a sublicense agreement with Krafft-Murphy to sell Limpet in an area that expressly included the District of Columbia. This sublicense agreement was subject to T & N's approval. Krafft-Murphy employed the plaintiff. . . . T & N shipped Limpet for use in the District of Columbia to ports in Maryland and New Jersey. The Limpet was trucked from the ports to a Krafft warehouse or delivered directly to District of Columbia construction sites.

In 1967, the license held by Armstrong was transferred to Atlas Asbestos Co., an internal division of T & N's wholly owned subsidiary, Bell. In addition to being the licensee for the distribution of Limpet in the United States, Atlas manufactured Limpet. Most of the asbestos fiber used by Atlas in the manufacturing process was supplied by a subsidiary of T & N. The sublicense with

> Krafft-Murphy was also transferred from Armstrong to Atlas. Thereafter, Krafft-Murphy applied Limpet in buildings located in the District of Columbia throughout the period it served as sublicensee. Atlas frequently shipped Sprayed Limpet Asbestos ordered by Krafft-Murphy directly to District of Columbia jobsites by truck from Canada. On other occasions shipments were made to the Keasbey and Mattison warehouse in Virginia. In 1977 Atlas Asbestos Company became a separate corporate entity and changed its name to Atlas-Turner, Inc.

Id. at 1339-40.

The Plaintiffs contend Atlas has had sufficient contacts with Arizona to support the Court's exercise of personal jurisdiction. They have offered evidence showing Atlas sold asbestos products to corporations that maintained nationwide distribution networks in the United States, including distribution points in Arizona. The Plaintiffs contend the FSIA does not apply in this case. Assuming the FSIA applies, the Plaintiffs further contend Atlas is not entitled to immunity under the FSIA, and was properly served under the FSIA. Finally, the Plaintiffs argue the Court should find the existence of personal jurisdiction as a sanction for Atlas' refusal to provide certain discovery.

DISCUSSION

Because the applicability of the Foreign Sovereign Immunities Act (FSIA) impacts the test to be used in determining the existence of personal jurisdiction, the Court will resolve that issue first.

A. Applicability of the FSIA

Atlas contends the FSIA applies in this case. Although its argument is not clearly stated, Atlas contends it is immune under the FSIA. The Plaintiffs contend the FSIA does not apply because Atlas was not a sovereign entity at the time of the conduct at issue in this case. In addition, the Plaintiffs contend Atlas' activity in this case falls within one of the exceptions to immunity under the FSIA.

Atlas has been a foreign state within the meaning of 28 U.S.C. section 1603 since May 19, 1980. 28 U.S.C. section 1604 states, in pertinent part: "[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

"[F]oreign sovereign immunity is a matter of grace and comity on the part of the United States." *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 486 (1983) (discussing history of sovereign immunity and FSIA). Congress enacted the FSIA in 1976 to codify the "restrictive theory" of sovereign immunity. *Id.* at 488; Prior to the enactment of the FSIA, the Department of State made case-by-case decisions regarding sovereign immunity. *Id.* Congress' enactment of the FSIA gave the courts the power to decide immunity as a matter of law. *Id.* If the FSIA applies, the defendant is immune from suit, and the court lacks both personal and subject-matter jurisdiction over the defendant, unless one of the FSIA's statutory exceptions applies. *Id.* at 485 n.5. The exceptions to the FSIA grant Article III "arising under" jurisdiction to the federal courts. *Id.* at 489. Because sovereign immunity deprives a court of subject-matter jurisdiction, district courts must decide the availability of immunity under the FSIA even when the foreign state fails to appear and assert an immunity defense. *Id.* at 493 n.20. Thus, Atlas' default in this case does not prevent it from raising foreign sovereign immunity as a defense.

The first issue the court must address is whether the FSIA applies in light of Atlas' former status as a private entity. The court of Appeals for the Ninth Circuit has applied the FSIA in cases in which foreign governments acquired control over private entities, even after the commencement of the lawsuit. *West v. Multibanco Comermex, S.A.,* 807 F.2d 820, 823 (9th Cir. 1987); *Wolf v. Banco Nacional de Mexico, S.A.,* 739 F.2d 1458 (9th Cir. 1984), *cert. denied,* 469 U.S. 1108 (1985). The Fifth Circuit has done likewise. *Callejo v. Bancomer, S.A.,* 764 F.2d 1101, 1106 (5th Cir. 1985). Other courts have stated a party's status at the time of the conduct at issue in the lawsuit controls whether the party is entitled to be treated as a "foreign state." *Gould. Inc. v. Pickiney Ugine Kuhlmann,* 853 F.2d 445, 450

(6th Cir. 1988); *Chase & Sanborn Corp. v. Granfinanciera,* 835 F.2d 1341, 1347-48 (11th Cir. 1988). None of the above-cited decisions contains any discussion of the reasons for applying or refusing to apply the FSIA in cases in which a foreign government assumes control over a private entity after the occurrence of the conduct underlying the lawsuit.

The Ninth Circuit's application of the FSIA in cases in which the party became a foreign state after the commencement of the litigation is binding on this Court. In addition, the Court finds the FSIA provides a strong basis for its application without regard to the timing of a party's becoming a foreign state. The FSIA grants immunity from jurisdiction rather than liability. Immunity from jurisdiction is a courtesy the United States government extends to foreign sovereigns based on comity and respect for their independent sovereign governmental processes. The mere involvement of a foreign sovereign implicates the United States government's interest in pursuing comity and grace among nations. In light of the United States government's interests, and because the FSIA grants immunity from jurisdiction rather than immunity from liability, the Court finds the FSIA applies in all cases involving a foreign state no matter when the party achieves that status.

This does not mean an entity that becomes a foreign state automatically becomes immune from the jurisdiction of courts in the United States. Courts must make that determination by evaluating the entity's conduct under 28 U.S.C. sections 1605 through 1607. *See West,* 807 F.2d at 824-26; *Wolf,* 739 F.2d at 1460.

28 U.S.C. section 1605(a) provides, in pertinent part:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> > (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; . . . or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;
> >
> > . . .

> (5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death. . . . occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—
>
> (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
>
> (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. . . .

The Court finds Atlas' conduct at issue in this case falls into all three of the exceptions to immunity enumerated above.

Atlas' activity was indisputably commercial in nature. Atlas engaged in the manufacture and sale of asbestos products. Indeed, as a non-governmental, for-profit corporation at the time of its activity, Atlas' activity was incapable of being anything other than commercial. *See Schoenberg v. Exportadora de Sal,* 930 F.2d 777, 780 (9th Cir. 1991) (activity is commercial if it is "of the type an individual would customarily carry on for profit); *Meadows v. Dominican Republic,* 817 F.2d 517, 523 (9th Cir.) ("The term 'commercial activity' applies to an agreement that might be made by a private person, notwithstanding the fact that the foods or services . . . are to be used for a public purpose. . . . A public activity is one which only a sovereign state can perform."), *cert. denied,* 484 U.S. 976 (1987).

Thus, the only question is whether Atlas' activity either (1) was carried on in the United States or (2) was carried on outside the United States and had a direct effect in the United States. Under the FSIA, once a plaintiff offers evidence showing a defendant claiming sovereign immunity engaged in commercial activity, the defendant must prove by a preponderance

of the evidence that its activities were not carried on in the United States and did not have a direct effect in the United States. *Id.*

The Court finds Atlas carried on its activity within the United States. Atlas' commercial activity was "carried on in the United States" if the activity had "substantial contact with the United States." 28 U.S.C. § 1603(e). The Plaintiffs offered evidence showing Atlas used American companies, including Armstrong Contracting and Supplying Company (Armstrong), to distribute asbestos in the United States. In addition, other courts have recounted Atlas' contacts with the United States in significant detail. *See, e.g., McDaniel v. Armstrong World Industries,* 603 F. Supp. 1337, 1340 (D.D.C. 1985). Thus, Atlas' commercial activities had substantial contact with the United States. *Cf. Exportadora,* 930 F.2d at 781 (finding arrangement of a single trip beginning and ending in United States through an office in the United States constituted substantial contact with the United States). Other than the affidavit of Alain Dulude, Atlas has not come forward with any evidence to show it did not carry on activity in the United States within the meaning of 28 U.S.C. § 1603(e). As the Court previously noted, the Dulude affidavit does not contain any statements regarding whether Atlas intended or expected its goods to be distributed in the United States or specifically in Arizona. In light of the evidence showing Atlas distributed asbestos in the United States through other companies, the Court finds Atlas has not met its burden of proof on this issue.

In addition, the Court finds Atlas' activity had a direct effect in the United States. The Plaintiffs offered evidence showing Harold Straub encountered Atlas' asbestos products while working for Armstrong in Phoenix, Arizona in 1967 and 1968. Thus, the Plaintiffs offered sufficient evidence to show Atlas' distribution of asbestos had a direct effect in the United States. Atlas has not offered any evidence to contradict the Plaintiffs' showing. Because Atlas has not presented any evidence showing its commercial activities did not have a direct effect in the United States, the Court finds Atlas has not met its burden of proof on this issue.

Finally, the Court finds Atlas' activity falls within the immunity exception set forth in 28 U.S.C. section 1605(a)(5), and does not fall within the exemption provided in 28 U.S.C. section 1605(a)(5)(A). The Plaintiffs seek to recover damages from Atlas for personal injury or death occurring in the United States as a result of Atlas' tortious production and sale of a dangerous product, asbestos. Atlas contends its activity is cloaked with immunity because the Quebec government, in assuming control of the asbestos industry, exercised a discretionary governmental function. However, the conduct out of which this lawsuit arises involves Atlas' distribution of asbestos, not the Quebec government's decision to assume control over the asbestos industry. Atlas was not a governmental entity at the time the activity took place. Therefore, Atlas' asbestos sales could not have amounted to an exercise of or failure to exercise discretionary governmental authority.

Based on the foregoing, the Court finds Atlas has not met its burden of proving its entitlement to immunity under the FSIA. See Meadows, 817 F.2d at 523. Therefore, this Court has subject-matter jurisdiction over this action.

B. Personal Jurisdiction

Atlas could have appeared in this action to contest the Court's jurisdiction prior to the entry of default. Had it done so, it would have placed the burden of proving jurisdiction on the plaintiffs. Because Atlas failed to challenge the Court's jurisdiction prior to the entry of judgment, it now bears the burden of proving the absence of jurisdiction.

The relevant forum for determining minimum contacts under the FSIA is the United States as a whole. *Meadows v. Dominican Republic,* 817 F.2d 517, 523 (9th Cir.), *cert. denied,* 484 U.S. 976 (1987). Atlas' continuous sales of asbestos for distribution in the United States over a period of many years resulted in numerous contacts with the United States. Those contacts have been recounted in many cases, including several in which courts considered versions of the Dulude affidavit and specifically rejected Atlas' contention that its sales of asbestos F.O.B. Montreal prevented its sales from qualifying

as contacts with the United States.[1] *E.g., Dapkunas v. A.C. & S., Inc.*, 1986 WL 561, *1 (E. D. Pa. 1986); *In re Connecticut Asbestos Litig.*, 677 F. Supp. 70, 74 (D. Conn. 1986). Based on the contacts set forth in those cases along with Atlas' contacts with Arizona set forth below, the Court finds Atlas' contacts with the United States are sufficient to confer personal jurisdiction over Atlas. *See Richmark Corp. v. Timber Falling Consultants, Inc.*, 937 F. 2d 1444, 1446-47 (9th Cir. 1991); *Meadows*, 817 F.2d at 523.[2]

The Court further finds Atlas is subject to personal jurisdiction even assuming Arizona is the relevant forum under the FSIA. Absent application of a federal statute, this Court looks to the law of Arizona when issues concerning personal jurisdiction arise. *Corporate Inv. Business Brokers v. Melcher*, 824 F.2d 786, 787 (9th Cir. 1987). Arizona's long-arm statute allows the exercise of jurisdiction over parties to the extent allowable under the United States Constitution. *Batton v. Tennessee Farmers Mut. Ins. Co.*, 153 Ariz. 268, 270, 736 P.2d 2, 4 (1987). Arizona courts no longer conduct a separate analysis of whether the requirements of Arizona Rule of Civil Procedure 4(e) are met, but instead determine the question of personal jurisdiction solely on the basis of whether constitutional requirements are met. *Id.*

Personal jurisdiction under the United States Constitution may take two forms: specific jurisdiction and general jurisdiction. The parties have not presented the issue of general jurisdiction in this case. Specific jurisdiction exists if a party purposefully commits sufficient acts, within Arizona and from which the lawsuit arises, to make an exercise of jurisdiction reasonable. *Batton*, 153 Ariz. at 271, 736 P.2d at 5. Specific

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1. In light of these decisions, the court questions Atlas' good faith in raising this argument. Atlas' counsel may not have had knowledge of these decisions, but Atlas, as a party, had to have known of them. Atlas' failure to disclose the cases in which other courts exercised personal jurisdiction over Atlas to this Court is very disturbing.

2. The Court also notes the above-cited decisions collaterally estop Atlas from denying personal jurisdiction in the United States based on a lack of minimum contacts. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326-27 (1979). This fact makes Atlas' representations to the contrary, and especially its continued use of the Dulude affidavit, even more disturbing.

jurisdiction gives a court jurisdiction only over the claim arising out of the defendant's contacts with the forum.

> Purposeful availment requires that the defendant engage in some form of affirmative conduct allowing or promoting the transaction of business within the forum state. This focus upon the affirmative conduct of the defendant is designed to ensure that the defendant is not haled into court as the result of random, fortuitous or attenuated contacts.

Shute v. Carnival Cruise-Lines, 897 F.2d 377, 381 (9th Cir. 1990).

The Court of Appeals for the Ninth Circuit recently adopted a but-for test for determining whether a complaint arises from or is related to the defendant's conduct in the forum state. *Shute,* 897 F.2d at 385-86. If a Plaintiff would not have been injured but for the defendant's contact with the forum, the "arising out of" requirement is met. *Id.*

In *Asahi Metal Industries v. Superior, Court of California,* 480 U.S. 102 (1987), the United States Supreme Court addressed a scenario similar to the one in this case. In *Asahi,* the plaintiff suffered injuries and the loss of his wife in a motorcycle accident. He later filed suit alleging the accident resulted from a sudden loss of air and explosion in the rear tire of the motorcycle. The plaintiff named Cheng Shin, the Taiwanese manufacturer of the inner tube, as a defendant. Cheng Shin sued Asahi Metal Industries, the Japanese manufacturer of the air valves used in the inner tube, for indemnity. Asahi moved to quash the summons Cheng served on it.

Asahi's sales to Cheng Shin took place in Taiwan, and its shipments went from Japan to Taiwan. Cheng Shin manufactured inner tubes in Taiwan and distributed them throughout the world, including the United States. The California Supreme Court concluded the exercise of personal jurisdiction over Asahi satisfied the due process clause because Asahi intentionally placed its valves in the stream of commerce with the knowledge that its products would find their way into California.

The United States Supreme Court reversed, and held the California court's exercise of jurisdiction over Asahi was unreasonable. In so holding, the Court considered "the burden on the defendant, the interests of the forum State, . . . the plaintiff's interest in obtaining relief[,] . . . 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies[,] and the shared interest of the several States in furthering fundamental substantive social policies.' " *Id.* at 113 (citation omitted). The Court found the burden on Asahi was severe because Asahi was being forced "to traverse the distance between Asahi's headquarters in Japan and . . . California" and "to submit its dispute with Cheng Shin to a foreign nation's judicial system." *Id.* at 114. The Court stated:

> The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.
>
> When minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant.

Id. The Court noted the plaintiff and California had only slight interests in the exercise of jurisdiction over Cheng Shin's indemnity claim against Asahi because both corporations were from other countries, and because the corporations did not conduct business with each other in the United States. In addition, the Court noted Cheng Shin produced no evidence to demonstrate that litigating against Asahi in California would have been more convenient for Cheng Shin than litigating in Taiwan or Japan. The Court went on to note that the requirement of consideration of the interests of the "several States" counseled consideration of the interests of other nations when contemplating an exercise of jurisdiction over a foreign defendant.

> The procedural and substantive interests of other nations in a state court's' assertion of jurisdiction over an alien defendant will differ from case to case. In every case, however, those interests, as well as the Federal inter-

> est in Government's foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State.

Id. at 115.

Prior to *Asahi,* the Ninth Circuit held a defendant has minimum contacts with the forum state if it "delivers its products into the stream of commerce with the expectation that they will reach the forum state. . . ." *Hedrick v. Daiko Shoji Co.,* 715 F.2d 1355, 1358 (9th Cir. 1983) (citing *World-Wide Volkswagen v. Woodson,* 444 U.S. 286, 297-98 (1980)). The court in *Hedrick* noted the defendants' placement of a splice into the stream of commerce "resembled the delivery into the stream of commerce of the defective valve in *Gray v. American Radiator Standard Sanitary Corp.,* 22 Ill.2d 432, 176 N.E.2d 761 (1961), cited with approval in *World-Wide Volkswagen,* 444 U.S. at 298, 100 S. Ct. at 257." *Id.*

Atlas contends *Asahi* overruled *Hedrick.* However, the portion of *Asahi* Atlas relies on did not represent the majority opinion of the Supreme Court. In section II-A, Justice O'Connor, joined by three other Justices, concluded placing a product into the stream of commerce, "without more, is not an act of the defendant purposefully directed toward the forum State." *Asahi,* 480 U.S. at 112. Justice O'Connor described the types of additional conduct that might result in sufficient minimum contacts. One of those acts is "marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Id.*

Part II-A of Justice O'Connor's opinion in *Asahi* clearly would have overruled *Hedrick.* However, because a majority of the Justices did not join that portion of the opinion, *Asahi* did not overrule *Hedrick.* Indeed, in *Shute v. Carnival Cruise Lines,* 897 F.2d 377 (9th Cir. 1990), the Ninth Circuit recognized its adoption of a but-for test for determining whether a complaint arises from or is related to the defendant's conduct in the forum state is consistent with its prior holdings "finding

jurisdiction over manufacturers of defective goods sent into a state." *Id.* at 385 (citing *Hedrick).* Thus, the Ninth Circuit has treated its holding in *Hedrick* as current despite *Asahi.*

In *Sousa v. Ocean Sunflower Shipping Co.,* 608 F. Supp. 1309 (N.D. Cal. 1984), the court pointed out a critical distinction between *Hedrick* and *World-Wide Volkswagen,* noting that the Supreme Court in *World-Wide Volkswagen* required an expectation that the products would be *purchased* by consumers in the forum state. *Id.* at 1312. The court discussed the history of the stream of commerce theory, and noted courts developed the stream of commerce theory "to prevent manufacturers from insulating themselves from product liability suits merely by using distribution 'middlemen' or by professing ignorance of the product's ultimate destination." *Id.* at 1313 (citing *DeJames v. Magnificence Carriers, Inc.,* 654 F.2d 280, 285 (3d Cir.), *cert. denied,* 454 U.S. 1085 (1981)).

> Personal jurisdiction is reasonable because by increasing the distribution of its products through indirect sales within the forum, a manufacturer benefits legally from the protection provided by the laws of the forum state, as well as economically from indirect sales to forum residents.
>
> . . .
>
> Positioned at the start of the distribution system, a manufacturer purposefully conducts its activities to make its products available for purchase in as many forums as possible, thereby directly and indirectly serving a wide market. . . . Because a manufacturer intends to serve a broad market, and because it derives direct economic benefit from serving that market, a manufacturer may be subject to a particular forum's jurisdiction.

Id. The court went on to note the critical distinction between *Hedrick* and *World-Wide Volkswagen* is *World-Wide Volkswagen's* requirement of a connection between the forum and the defendant's activity rather than the unilateral activity of a third party. *Id.* at 1313-14.

In this case, Atlas has failed to come forward with sufficient evidence to demonstrate a lack of jurisdiction over it. Although the affidavit Atlas provided constituted sufficient

evidence to raise a jurisdictional question, the Plaintiffs offered sufficient evidence to show Atlas placed asbestos into the stream of commerce knowing it would be distributed throughout the United States and in Arizona.

The Plaintiffs offered evidence showing Plaintiff Harold Straub encountered Atlas products while he was employed by Armstrong Contracting and Supplying Company (Armstrong) in Phoenix, Arizona in 1967 and 1968. Atlas maintained an export branch, through which it sold asbestos products to American companies including Armstrong, a national contractor and supplier of asbestos materials. The Plaintiffs further showed Atlas knew Armstrong was shipping Atlas' products to various worksites in the United States. Thus, Atlas' conduct satisfies the minimum contacts standard set forth in *Hedrick* and the "but-for" test adopted in *Shute*.

In addition, the limited discovery Atlas provided in this case shows Atlas advertised and sold its products to American companies for distribution throughout the United States. Thus, Atlas' business activities show that Atlas placed its products into the stream of commerce *intending* them to be sold throughout the United States, including Arizona. Atlas' intent to have its products sold throughout the United States implies its intent to have its products purchased throughout the United States. Atlas' sales to large American distributors and use of their distribution networks instead of its own, combined with its receipt of payments in Montreal, indicate a desire to avoid the responsibility commensurate with manufacturing an insidious product such as asbestos. This avoidance tactic falls squarely within the above-quoted discussion in *Sousa*. Thus, the nature and quality of Atlas' contacts with Arizona support a finding of personal jurisdiction. *Cf. Stanek v. A.P.I., Inc.*, 474 N.W.2d 829 (Minn. App. 1991). Atlas has not rebutted the evidence showing its intentional use of other companies' distribution networks to cause its products to be sold in Arizona. Therefore, the Court finds Atlas' conduct satisfies the more stringent minimum contacts test discussed in Justice O'Connor's separate opinion in *Asahi*, and satisfies the proffered distinction between *Hedrick* and *World-Wide Volkswagen*.

Addressing the reasonableness of exercising personal jurisdiction, the Court finds Atlas would not have faced a great burden in defending itself in Arizona. Atlas has retained local counsel, and air travel from Canada to Arizona is neither difficult nor prohibitively expensive. Even assuming Atlas would face a heavy burden in defending itself in Arizona's courts, such a burden is minimal in light of the gravity of the allegations of the complaint. In addition, because it used American distributors to sell its products to purchasers throughout the United States, Atlas reasonably could have foreseen being haled into court in Arizona. *See World-Wide Volkswagen,* 444 U.S. at 297-98. The Plaintiffs' interest in recovery in this case is very strong. Moreover, Arizona has a strong interest in protecting its citizens from the harm of asbestos, as well as enabling its citizens to recover from those who harm them with products shipped into Arizona. Finally, Canada's procedural and substantive interests in Arizona's exercise of jurisdiction over Atlas pale in comparison to the United States government's interest in resolving the crisis asbestos has visited upon this Nation's people and its courts. *See* Order dated July 29, 1991, Judicial Panel on Multi-District Litigation (discussing the number of asbestos claims pending in U.S. courts).

Based on the foregoing, the Court finds Atlas's placement of asbestos into the stream of commerce with the intent of having its products distributed throughout the United States, including Arizona, constituted minimum contacts sufficient to make this Court's exercise of personal jurisdiction over Atlas reasonable.

Because the Court has found the existence of personal jurisdiction on the merits, it need not address the issue of finding personal jurisdiction as a sanction for failure to provide discovery.

C. Propriety of Service Under the FSIA

Atlas contends the Plaintiffs did not effect proper service upon it under the FSIA because "the signatures appearing on the registered mail receipt contained in the court's file do not

bear the names of individuals authorized to accept service of process on behalf of Atlas." The Plaintiffs argue they properly served Atlas under 28 U.S.C. section 1608(b)(2). However, the language the Plaintiffs quote in their response indicates they also are relying on 28 U.S.C section 1608(b)(3)(B).

28 U.S.C. section 1608(b)(2) provides for service upon a foreign instrumentality

> by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents.

The United States and Canada are signatories to the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague Convention). Article 10 of the Hague Convention states the convention shall not interfere with "the freedom to send judicial documents, by postal channels, directly to persons abroad" if the signatory does not object to such service. Canada has not objected to service through postal channels, and federal courts consistently have upheld service by mail under the Hague convention. *Deptula v. Derr-Flooring Co.*, 1990 WL 96635, *3 (1990) (citing *Ackerman v. Levine*, 788 F.2d 830, 839 (2d Cir. 1986)). The Court of Appeals for the Ninth Circuit also has recognized Hague Convention's applicability to service under section 1608(b)(2). *See Richmark Corn, v. Timber Falling Consultants, Inc.*, 937 F.2d 1444, 1448 (9th Cir. 1991).

If a plaintiff cannot accomplish service under 28 U.S.C. section 1608(b)(1) or (2), 28 U.S.C. section 1608(b)(3) provides for service

> by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—
>
> . . . .

> (B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served . . . .

Service under section 1608(b)(3) must be reasonably calculated to give actual notice.

The Plaintiffs served Atlas by mailing a copy of the summons and complaint to Atlas at its headquarters via registered mail, return receipt requested. A person named C. Benoit signed for the documents on September 22, 1986. Because attorneys for Atlas contacted the Court about the status of the case prior to the entry of the default judgment on April 1, 1991, the Court finds Atlas had actual notice of the lawsuit.

Atlas contends the Plaintiffs have not shown C. Benoit was an agent authorized to accept service of process on behalf of Atlas. Section 1608(b)(2) allows service upon an officer or a managing or general agent as well as an agent specially authorized to accept service of process. Again, because Atlas defaulted, Atlas bears the burden of proof on this issue. Atlas has not come forward with any evidence regarding C. Benoit's relation to Atlas on September 22, 1986. In addition, Atlas failed to explain how it came to know of the action after C. Benoit signed for the summons and complaint. In the absence of any explanation, the only reasonable inference to be drawn from the evidence is that C. Benoit acted as some sort of agent for Atlas, and delivered the summons and complaint to an officer or other responsible person at Atlas.

In light of the foregoing, the Court finds the purpose and requirements of section 1608(b) have been satisfied because (1) Atlas had actual notice of the action, (2) Atlas has failed to explain C. Benoit's relationship with Atlas and thus has failed to show C. Benoit's acceptance of service on behalf of Atlas was invalid, and (3) Atlas received service of process in accordance with the Hague convention. *See Deptula*, 1990 WL 96635 at *3.

Atlas also contends the default judgment is void because the Plaintiffs failed to serve notice of the default judgment pursuant to section 1608(e). This argument is without merit.

The FSIA consistently distinguishes foreign states and political subdivisions from agencies and instrumentalities.

Compare 28 U.S.C. § 1608(a) *with* 28 U.S.C. section 1608(b). The first sentence of subsection (e) expressly refers to foreign states, political subdivisions of foreign states, and agencies and instrumentalities of foreign states. The sentence in subsection (e) requiring service of the default judgment refers only to foreign states and subdivisions. Thus, subsection (e) requires a plaintiff to send a copy of the default judgment "to the foreign state or political subdivision," not to the agency or instrumentality. As an instrumentality, Atlas was not entitled to service of the default judgment under subsection (e).

In addition, Atlas has actual notice or the default judgment, and the purpose of subsection (e) has been served. Finally, subsection (e) does not contain a time requirement; therefore, nothing would prevent the Plaintiffs from perfecting the default judgment by serving it on Atlas any time prior to attempting to enforce the judgment.

CONCLUSION

Based on the foregoing, the Court finds Atlas is subject to the court's jurisdiction. Therefore, this Court's default judgment against Atlas is not void, and Atlas is not entitled to relief under Federal Rule of Civil Procedure 60(b).

IT IS ORDERED denying Atlas' motion and revised motion to set aside the default judgment for lack of jurisdiction (Doc. # 398, 415).

IT IS FURTHER ORDERED denying the Plaintiffs' motion for sanctions (Doc. # 411) as moot.

DATED this 26th day of May, 1992.

Stephen M. NcNamee
United States District Judge

Copies to all counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

HAROLD E. STRAUB, et ux, *Plaintiffs,* v. A.P. GREEN, INC., et al., *Defendants.*	**FILED** **APR 01 1991** United States District Court For The District of Arizona By [Initials] Deputy Clerk CIV-85-0431 PHX SMM **JUDGMENT** **BY DEFAULT**

This action came on for consideration before the Court, the Honorable Stephen M. McNamee, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED plaintiffs are hereby granted judgment against defendant Atlas Turner, Inc. in the amount of $506,300.00.

Dated at Phoenix, Arizona, this 1st day of April, 1991.

RICHARD H. WEARE, Clerk

By:_____
A. P. Juarez, Deputy Clerk

cc: all counsel

CIV-21 (6/5/85)

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

HAROLD E. STRAUB, et ux.,	)	**FILED**
Plaintiffs,	)	**APR 01 1991**
	)	United States District Court
	)	For The District of Arizona
v.	)	By [Initials]
	)	Deputy Clerk
A.P. GREEN, INC., et al.,	)	No. CIV 85-431 PHX SMM
Defendants.	)	**ORDER**

Plaintiffs have filed a motion for default judgment against Defendant Atlas Turner, Inc., the only remaining Defendant in this action, pursuant to Federal Rule of Civil Procedure 55(b) (2). The Clerk of the Court entered default against Atlas Turner on January 8, 1991. Plaintiffs now seek judgment against Atlas Turner in the amount of $506,300.00. Atlas Turner has not appeared to oppose Plaintiffs' request for entry of default or application for default judgment.

Ordinarily the Court would hold a hearing regarding the amount of damages when granting judgment pursuant to Rule 55(b)(2). However, in this case, the Court already held a hearing regarding Plaintiffs' damages when it granted default judgment against Defendant Atlas Asbestos Company. The Court received evidence, made factual findings concerning Plaintiffs' damages, and concluded that Plaintiffs sustained-damages in the amount of $506,300.00 as a result of Harold Straub's exposure to asbestos fibers. The Court entered judgment against Atlas Asbestos on August 3, 1990.

Plaintiffs' damages effectively were liquidated as of August 3, 1990. In addition, the Court would receive the same evidence and make the same findings if it were to hold a subsequent hearing on Plaintiffs' damages. Therefore, the Court finds that further hearing on Plaintiffs' damages is unnecessary. *See* Fed. R. Civ. P. 78.

The Court finds that Defendant Atlas Turner, Inc. was properly served in this action and failed to appear and defend against Plaintiffs' claims. The Court further finds, based on the factual findings made in its Order dated August 3, 1990 and

filed August 15, 1990, that Plaintiffs have sustained damages in the amount of $506,300.00 as outlined in the above-referenced Order.

IT IS "THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiffs are entitled to judgment against defendant Atlas Turner, Inc. in the amount of $506,300.00.

DATED this 28th day of March, 1991.

Stephen M. McNamee
United States District Judge

Copies to all counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

FILED
OCT 7 1988
RICHARD H. WEARE, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BY /s/
DEPUTY CLERK

CIVIL MINUTES - GENERAL

Civil Case No. CIV 85-155-T-RMB Date: 10-6-88

Title: William F. Conkwright vs. A.C. & S., Inc.

PRESENT:
HON. RICHARD M. BILBY, JUDGE

Virginia Abeyta	Carol Post
Deputy Clerk	Court Reporter

Attorney(s) for Plaintiff(s)	Attorney(s) for Defendant(s)
Robert W. Boatman	

PROCEEDINGS: X Open Court ____ Chambers ____ Other

Hearing Re: Default Judgment:
Counsel makes statement to the Court.

Ordered, Judgment is entered in favor of the Plaintiff's and against the defendants Atlas Turner, Inc. and Atlas Asbestos Company, Ltd., in the amount of $250,000.00 plus costs incurred.

Court makes finding on the record.

Copies issued to:

Boatman, RMB

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BERNARD F. SIMBURGER and ROXIE L. SIMBURGER, husband and wife,	)	**FILED** **MAR 08 1988** Richard H. Weaver, Clerk United States District Court For the District of Arizona By _____ Deputy Clerk
Plaintiffs,	)	
v.	)	CIV 85-435 PHX RCB
THE CELOTEX CORPORATION, et al.,	)	JUDGMENT
Defendants.	)	

Plaintiffs having moved the court for determination and entry of judgment by default of defendants Atlas-Turner, Inc. and Atlas Asbestos Company, Ltd.; the court finding that defendants were served with process in this cause as shown by proof of service on file herein; that defendants time for answer has expired and they are presently in default; and the court having heard evidence from plaintiff Bernard F. Simburger as to his damages in this cause and taking into account plaintiff's potential for damages in the future; the court concludes that plaintiffs are entitled to judgment against defendants for compensatory damages in the sum of $75,000; the court further concludes that plaintiff is not entitled to judgment for punitive damages.

IT IS ORDERED that plaintiffs have judgment against defendants Atlas-Turner, Inc. and Atlas Asbestos Company, Ltd. in the sum of $75,000 plus their taxable costs.

DATED this 3rd day of March, 1988.

Robert C. Broomfield
United States District Judge

Copies to all counsel of record

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HELEN CONKWRIGHT, as surviving spouse of William Conkwright, deceased, and on her own behalf,	)	FILED
	)	DEC 20 1996
	)	
	)	CATHY A. CATTERSON,
Plaintiff-Appellee,	)	CLERK
	)	U.S. COURT OF APPEALS
v.	)	
	)	No. 95-16049
A C & S INC.,	)	
	)	D.C. No. CV-95-00133-SMM
Defendant,	)	
	)	
and	)	
	)	
ATLAS TURNER, INC.	)	
	)	
Defendant-Appellant.	)	
	)	
BERNARD SIMBURGER; ROXIE SIMBURGER, husband and wife,	)	
	)	
Plaintiffs-Appellees,	)	
	)	
v.	)	
	)	No. 95-16086
CELOTEX CORPORATION,	)	
	)	D.C. No. CV-85-00435-RCB
Defendant,	)	
	)	
and	)	
	)	
ATLAS TURNER, INC.	)	
	)	
Defendant-Appellant.	)	
	)	

HAROLD E. STRAUB,	)	
	)	
Plaintiff-Appellee,	)	
	)	No. 95-16101
v.	)	
	)	D.C. No. CV-85-00431-SMM
ATLAS TURNER, INC.	)	
	)	ORDER
Defendant-Appellant.	)	
	)	

Before: WOOD*, SCHROEDER, and HALL, Circuit Judges

The panel has voted to deny appellants' petition for rehearing. Judges Schroeder and Hall have voted to reject the suggestion for rehearing en banc and Judge Wood recommends rejection.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

---

* Hon. Harlington Wood, Jr., Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HELEN CONKWRIGHT, as surviving spouse of William Conkwright, deceased, and on her own behalf,	)	FILED
	)	
	)	DEC 30 1996
Plaintiff-Appellee,	)	CATHY A. CATTERSON, CLERK
v.	)	U.S. COURT OF APPEALS
	)	No. 95-16049
A C & S INC.,	)	
	)	D.C. No. CV-95-00133-SMM
Defendant,	)	
and	)	
ATLAS TURNER, INC.	)	
Defendant-Appellant.	)	
BERNARD SIMBURGER; ROXIE SIMBURGER, husband and wife,	)	
Plaintiffs-Appellees,	)	
v.	)	
	)	No. 95-16086
CELOTEX CORPORATION,	)	
	)	D.C. No. CV-85-00435-RCB
Defendant,	)	
and	)	
ATLAS TURNER, INC.	)	
Defendant-Appellant.	)	

HAROLD E. STRAUB, *Plaintiff-Appellee,* v. ATLAS TURNER, INC. *Defendant-Appellant.*	No. 95-16101 D.C. No. CV-85-00431-SMM ORDER

Before: HALL, Circuit Judge

Appellant's motion for stay of mandate pending filing for a writ of certiorari is DENIED.

Thomas P. Burke, II, Esq. - #009631
Craig A. McCarthy, Esq. - #013128
HOLLOWAY & THOMAS, P.C.
2700 North Central Avenue
Suite 1500
Phoenix, Arizona 85004
(602) 274-8289

Attorneys for Defendant Atlas Turner, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

HAROLD E. STRAUB, et ux., *Plaintiffs,*	No.: CV 85-0431 PHX SMM
v.	
A. P. GREEN, INC., et al., *Defendants.*	AFFIDAVIT OF ALAIN DULUDE

Alain Dulude, being first duly sworn, deposes and says:

1. I am legal counsel for Atlas Turner, Inc., one of the defendants in the above-entitled matter, and as such, I have personal knowledge of the matters herein stated.

2. Since its incorporation, Atlas Turner, Inc. has been and is an entity incorporated and organized under the laws of Canada with its principal office in the Province of Quebec, now located in Montreal. It is not now and never has been a corporation organized or existing under the laws of the State of Arizona and has no subsidiary company which does business in the State of Arizona.

3. All of Atlas Turner, Inc.'s sales are made F.O.B. Montreal, Quebec, Canada. All payments are made to Atlas Turner, Inc. at Montreal, Quebec, Canada.

4. Atlas Turner, Inc. is not presently, nor has it ever been, registered as a foreign corporation doing business in the State of Arizona, nor has Atlas Turner, Inc. ever applied for a certificate of authority to do business within the State of Arizona.

5. Atlas Turner, Inc. has never appointed or authorized any agent to accept process for any suit filed in the State of Arizona.

6. Specifically, Atlas Turner, Inc. has never authorized or appointed any employees named "L. Plourde," "Burello," or "C. Benoit" to accept service of process, either personally or by mail, and that none of these individuals have ever acted in any executive capacity such as partner, officer, managing or general agent of Atlas Turner, Inc. or any other subsidiary or related entity thereof.

7. Atlas Turner, Inc. has never maintained an office within the State of Arizona.

8. Atlas Turner, Inc. has never been listed in any telephone directory in the State of Arizona.

9. Atlas Turner, Inc. has never maintained bank accounts in the State of Arizona.

10. Atlas Turner, Inc. has never initiated any lawsuit in the State of Arizona in which it has sought recovery of any money or other things due or owing to it or any other relief on its behalf.

11. Atlas Asbestos Company, Ltd. no longer exists, nor has it since 1979 when it ceased to operate as a going concern under that title and became Atlas Turner, Inc.

12. Atlas Turner, Inc. became a wholly-owned subsidiary of Société nationale de l'amiante (SNA) on May 19, 1980 and continues under such ownership today.

13. Société nationale de l'amiante (SNA) is a Crown Corporation established pursuant to parliamentary act by which the Province of Quebec assumed control of the asbestos industry.

14. Atlas Turner has not received notice by mail, by personal service, or in any other manner of Default Judgment ordered by the U.S. District Court of Arizona on either August 15, 1990 or April 1, 1991, as required by 28 U.S.C.S. § 1608.

FURTHER AFFIANT SAYETH NOT.

/s/
Alain Dulude

SUBSCRIBED AND SWORN TO before me at Thetford Mines, Quebec, Canada this 25th day of April, 1991.

Heather Wallace
A Commissioner for Oaths
District of Frontenac

My Commission Expires:
September 12, 1991

Kevin B. Sweeney (011737)
Peter C. Kelly, II, Esq. (014503)
HOLLOWAY ODEGARD & SWEENEY, P.C.
Suite 210
2700 North Central Avenue
Phoenix, Arizona 85004
(602) 240-6670

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
STATE OF ARIZONA

WILLIAM F. CONKWRIGHT and HELEN CONKWRIGHT, husband and wife, *Plaintiffs,*	)	No. CIV 85-155 TUC RMB
v.	)	AFFIDAVIT OF RICHARD DUFOUR
AC&S INC., et al., *Defendants.*	)	

Richard Dufour, being first duly sworn, deposes and says:

1. I am legal counsel for Atlas Turner, Inc., one of the defendants in the above-entitled matter, and as such, I have personal knowledge of the matters herein stated.

2. Since its incorporation, Atlas Turner, Inc. has been and is an entity incorporated and organized under the laws of Canada with its principle office in the Province of Quebec, now located in Montreal. It is not now and never has been a corporation organized or existing under the laws of the State of Arizona and has no subsidiary company which does business in the State of Arizona.

3. All of Atlas Turner, Inc.'s, sales were made F.O.B. Montreal, Quebec, Canada. All payments are made to Atlas Turner, Inc. at Montreal, Quebec, Canada.

4. Atlas Turner, Inc. is not presently, nor has it ever been, registered as a foreign corporation doing business in the State

of Arizona, nor has Atlas Turner, Inc. ever applied for a certificate of authority to do business in the State of Arizona.

5. Atlas Turner, Inc. has never appointed or authorized any agent to accept process for any suit filed in the State of Arizona.

6. Atlas Turner, Inc. has no records of an employee named "Burello" working for it and, therefore, has not authorized such an individual to accept service of process, either personally or by mail, and such an individual has never acted in any executive capacity such as partner, officer, managing or general agent of Atlas Turner, Inc. or any other subsidiary or related entity thereof.

7. Atlas Turner, Inc. did employ individuals named "L. Plourde" and "C. Benoit" at the relevant time but such individuals have never been authorized or appointed to accept service of process, neither of these individuals have ever acted in any executive capacity such as partner, officer manager or general agent of Atlas Turner, Inc. or any other subsidiary or related entity thereof.

8. Atlas Turner, Inc. has never maintained an office in the state of Arizona.

. . .

9. Atlas Turner, Inc. has never been listed in any telephone directory in the State of Arizona.

10. Atlas Turner, Inc. has never maintained bank accounts in the State of Arizona.

11. Atlas Turner, Inc. has never initiated any lawsuit in the State of Arizona in which it has sought recovery of any money or other things due or owing to it or any other relief on its behalf.

12. Atlas Asbestos Company, Ltd. was incorporated on September 21, 1976.

13. Atlas Asbestos Company, Ltd. changed its name in 1979 to Atlas Turner,, Inc.

14. Atlas Turner, Inc. became a wholly-owned subsidiary of Societe nationale de l'amiante (SNA) on May 19, 1980 and continued under such ownership until September 15, 1992 when Atlas Turner, Inc. was sold by SNA to Mazarin, Inc.

15. Societe nationale de l'amiante (SNA) is a Crown Corporation established pursuant to parliamentary act by which the Providence of Quebec assumed control of the asbestos industry.

16. Atlas Turner has not received notice by mail, by personal service, or in any other manner of the default judgment ordered by the U.S. District Court of Arizona on October 7, 1988, as required by 28 U.S.C.S. §1608.

Further Affiant Sayeth Naught.

/s/
RICHARD DUFOUR

. . .

SUBSCRIBED AND SWORN to before me at Laval, Quebec, Canada this 16th day of July, 1993.

/s/ 122217
A Commissioner for Oaths for
all judicial districts of the
Province of Quebec

My Commission Expires:

July 13, 1995

Kevin B. Sweeney (011737)
Peter C. Kelly, II, Esq. (014503)
HOLLOWAY ODEGARD & SWEENEY, P.C.
Suite 210
2700 North Central Avenue
Phoenix, Arizona 85004
(602) 240-6670

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
STATE OF ARIZONA

BERNARD F. SIMBERGER and ROXIE L. SIMBERGER, husband and wife, *Plaintiffs,*	No. CIV 85-435 PHX RCB
v.	AFFIDAVIT OF RICHARD DUFOUR
THE CELOTEX CORPORATION, et al., *Defendants.*	

Richard Dufour, being first duly sworn, deposes and says:

1. I am legal counsel for Atlas Turner, Inc., one of the defendants, in the above-entitled matter, and as such, I have personal knowledge of the matters herein stated.

2. Since its incorporation, Atlas Turner, Inc. has been and is an entity incorporated and organized under the laws of Canada with its principle office in the Province of Quebec, now located in Montreal. It is not now and never has been a corporation organized or existing under the laws of the State of Arizona and has no subsidiary company which does business in the State of Arizona.

3. All of Atlas Turner, Inc.'s, sales were made F.O.B. Montreal, Quebec, Canada. All payments are made to Atlas Turner, Inc. at Montreal, Quebec, Canada.

4. Atlas Turner, Inc. is not presently, nor has it ever been, registered as a foreign corporation doing business in the State

of Arizona, nor has Atlas Turner, Inc. ever applied for a certificate of authority to do business in the State of Arizona.

5. Atlas Turner, Inc. has never appointed or authorized any agent to accept process for any suit filed in the State of Arizona.

6. Atlas Turner, Inc. has no records of an employee named "Burello" working for it and, therefore, has not authorized such an individual to accept service of process, either personally or by mail, and such an individual has never acted in any executive capacity such as partner, officer, managing or general agent of Atlas Turner, Inc. or any other subsidiary or related entity thereof.

7. Atlas Turner, Inc. did employ individuals named "L. Plourde" and "C. Benoit" at the relevant time but such individuals have never been authorized or appointed to accept service of process, neither of these individuals have ever acted in any executive capacity such as partner, officer manager or general agent of Atlas Turner, Inc. or any other subsidiary or related entity thereof.

8. Atlas Turner, Inc. has never maintained an office in the State of Arizona.

9. Atlas Turner, Inc. has never been listed in any telephone directory in the State of Arizona.

10. Atlas Turner, Inc. has never maintained bank accounts in the State of Arizona.

11. Atlas Turner, Inc. has never initiated any lawsuit in the State of Arizona in which it has sought recovery of any money or other things due or owing to it or any other relief on its behalf.

12. Atlas Asbestos Company, Ltd. was incorporated on September 21, 1976.

13. Atlas Asbestos Company, Ltd. changed its name in 1979 to Atlas Turner, Inc.

14. Atlas Turner, Inc. became a wholly-owned subsidiary of Societe nationale de l'amiante (SNA) on May 19, 1980 and continued under such ownership until September 15, 1992 when Atlas Turner, Inc. was sold by SNA to Mazarin, Inc.

15. Societe nationale de l'amiante (SNA) is a Crown Corporation established pursuant to parliamentary act by which the Providence of Quebec assured control of the asbestos industry.

16. Atlas Turner has not received notice by mail, by personal service, or in any other manner of the default judgment ordered by the U.S. District Court of Arizona on March 3, 1988, as required by 28 U.S.C.S. §1608.

Further Affiant Sayeth Naught.

/s/
RICHARD DUFOUR

. . .

SUBSCRIBED AND SWORN to before me at Laval, Quebec, Canada this 16th day of July, 1993.

/s/ 122217
A Commissioner for Oaths for all judicial districts of the Province of Quebec

My Commission Expires:

July 13, 1995

FILED
OCT 15 1986

U. S. DISTRICT COURT

MARICOPA COUNTY, STATE OF ARIZONA

ACTION NO.: CIV 85-431 PHX CLH

HAROLD E. STRAUB, ET UX.,

PLAINTIFF

vs.

A. P. GREEN, INC., ET AL.,

DEFENDANT

AFFIDAVIT OF SERVICE OF PROCESS BY PRIVATE PERSON

STATE OF ARIZONA)
) ss.
County of Maricopa)

The undersigned, being first duly sworn, states:

1. That I am fully qualified, pursuant to RCP 4(c), to serve process in this cause:

2. That on From: ROBERT G. BEGAM
Attorney for the PLAINTIFF 6100327

I received the following documents:

a) ALIAS SUMMONS & FIRST AMENDED COMPLAINT
b)
c)
d)
e)
f)

3. That I personally served copies of the above documents, on the person, at the time, place and manner as follows:

UPON ATLAS TURNER, INC., BY DISPATCHING ONE TRUE COPY TO SAID DEFENDANT AT THEIR MAILING ADDRESS, 5600 HACHELAGA STREET, MONTREAL, QUEBEC, CANADA HIN IWI, ON THE 15TH DAY OF SEPTEMBER 1986, AT THE UNITED STATES POST OFFICE, BY REGISTERED MAIL (R220 991 452), RETURN RECEIPT REQUESTED, POSTAGE PREPAID. SAID COPY WAS IN FACT DELIVERED TO AND RECEIVED BY C. BENOIT, ON THE 22nd DAY OF SEPTEMBER 1986, AS EVIDENCED BY THE RECEIPT, WHICH IS ATTACHED HERETO AND MADE A PART HEREOF. SAID RECEIPT WAS RETURNED TO AFFIANT ON THE 10TH DAY OF OCTOBER 1986.

HANS A. FRANDSEN

SUBSCRIBED AND SWORN to before me this 13th day of October 1986

JOHN D. FULLERTON , Notary Public

My Commission Expires: 7/6/87

TRACK DOWN, INC.
P.O. BOX 11206
PHOENIX, AZ. 85061
252-8521 6100327

Service 1CP	$ 7.50
0 Mi. @ 1.25	0.00
Minimum Mileage Total	4.00
Notary Fee	2.00
Witness Fee	–0.00
POSTAGE	4.18
	–0.00
TOTAL	$17.68

U. S. DISTRICT COURT OF ARIZONA

NAME OF ATTORNEY FOR: Plaintiffs
Robert G. Begam, Edythe H. Kelly
FIRM NAME, ADDRESS AND PHONE NUMBER ARE PRINTED IN LOWER LEFT

HAROLD E. STRAUB, et ux.,

Plaintiffs,

vs.

A.P. GREEN, INC., et al.,

Defendants.

CIVIL ACTION NO: CIV 85-431 PHX CLH
(CONSOLIDATED)

A L I A S
SUMMONS

THE UNITED STATES OF AMERICA TO THE DEFENDANTS:

ATLAS TURNER, INC.
Canada HIN IWI
5600 Hachelaga Street
Montreal, Quebec
Canada

YOU ARE HEREBY SUMMONED and required to serve upon the plaintiffs attorney an answer to the comp1aint which is herewith served upon you, within 20 days, exclusive of the day of service, after service of this summons upon you if served within the State of Arizona, and within 30 days, exclusive of the day of service, if served without the State of Arizona. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint **RCP4, 5, 10(d).**

The name and address of the plaintiff's attorney is:

Robert G. Begam
Edythe H. Kelly
Langerman, Begam, Lewis and Marks
111 West Monroe St., Suite 1400
Phoenix, AZ 85003-1787

SIGNED AND SEALED this date: 09 SEP 1986

RICHARD H. WEARE

Clerk

By: A. P. Juarez
Deputy Clerk

Attorney Firm Name and Address
Robert G. Begam
Edythe H. Kelly
LANGERMAN, BEGAM,
LEWIS AND MARKS
111 West Monroe, Suite 1400
Phoenix, AZ 85003-1787

SUMMONS (District Court)

FILED
OCT 8 1986

U. S. DISTRICT COURT

MARICOPA COUNTY, STATE OF ARIZONA

ACTION NO.: CIV 85-1551 TUC RMB

WILLIAM F. CONKWRIGHT, ET UX.,

, PLAINTIFF

vs

A C & S, INC., ET AL.,

, DEFENDANT

AFFIDAVIT OF SERVICE OF PROCESS BY PRIVATE PERSON

STATE OF ARIZONA)
) ss.
County of Maricopa)

The undersigned, being first duly sworn, states:

1. That I am fully Qualified, pursuant to RCP 4(c), to serve process in this cause:

2. That on 9/10/86 From: EDYTHE H. KELLY
Attorney for the PLAINTIFF 6090218

I received the following documents:
a) ALIAS SUMMONS & COMPLAINT
b)
c)
d)
e)
f)

3. That I personally served copies of the above documents, on the person, at the time, place and manner as follows:

UPON ATLAS TURNER, INC., BY DISPATCHING ONE TRUE COPY TO SAID DEFENDANT AT THEIR USUAL MAILING ADDRESS, 5600 HACHELAGA STREET, MONTREAL, QUEBEC, CANADA, HLH 1W1, ON THE 10TH DAY OF SEPTEMBER 1986, AT THE UNITED STATES POST OFFICE, BY REGISTERED MAIL (R220991441), RETURN RECEIPT REQUESTED, POSTAGE PREPAID. SAID COPY WAS IN FACT DELIVERED TO AND RECEIVED BY AN INDIVIDUAL OF THIS FIRM WHOSE SIGNATURE IS ILLEGIBLE, ON THE 16TH DAY OF SEPTEMBER 1986, AS EVIDENCED BY THE RECEIPT, WHICH IS ATTACHED HERETO AND MADE A PART HEREOF. SAID RECEIPT WAS RETURNED TO AFFIANT ON THE 27TH DAY OF SEPTEMBER 1986.

HANS A. FRANDSEN

SUBSCRIBED AND SWORN to before me this 27th day of Sept. 1986

JOHN D. FULLERTON , Notary Public

My Commission Expires: 7/6/87

TRACK DOWN, INC.
P.O. BOX 11206
PHOENIX, AZ. 85061
252-8521 6100327

Service 1CP	$ 7.50
0 Mi. @ 1.25	0.00
Min. Mileage Total	4.00
Notary Fee	2.00
Witness Fee	0.00
MAIL	4.88
	–0.00
TOTAL	$18.38

U. S. DISTRICT COURT OF ARIZONA

NAME OF ATTORNEY FOR: Plaintiffs

FIRM NAME, ADDRESS AND PHONE NUMBER ARE PRINTED IN LOWER LEFT

WILLIAM F. CONKWRIGHT, et ux.,

Plaintiffs,

vs.

A C & S, INC., et al.,

Defendants.

CIVIL ACTION NO: CIV 85-155 TUC RM

A L I A S
SUMMONS

THE UNITED STATES OF AMERICA TO THE DEFENDANTS:

ATLAS TURNER, INC.

YOU ARE HEREBY SUMMONED and required to serve upon the plaintiff's attorney an answer to the complaint which is herewith served upon you, within 20 days, exclusive of the day of service, after service of this summons upon you if served within the State of Arizona, and within 30 days, exclusive of the day of service, if served without the State of Arizona. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint **RCP4, 5, 10(d).**

The name and address of the plaintiff's attorney is:

Edythe H. Kelly
Langerman, Begam, Lewis and Marks
111 W. Monroe, Suite 1400
Phoenix, AZ 85003-1787
(602) 254-6071

SIGNED AND SEALED this date: SEP 2 1986

RICHARD H. WEARE

Clerk

By N. Lynn
Deputy Clerk

Attorney Firm Name and Address
Edythe H. Kelly
LANGERMAN, BEGAM,
LEWIS AND MARKS
111 West Monroe, Suite 1400
Phoenix, AZ 85003-1787

No. 96-1258

Supreme Court, U.S.
FILED
MAR 13 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

ATLAS TURNER, INC.,

Petitioner,

vs.

HAROLD E. STRAUB and PAULINE STRAUB, husband and wife; BERNARD F. SIMBURGER and ROXIE L. SIMBURGER, husband and wife; and HELEN CONKWRIGHT, as surviving spouse of WILLIAM F. CONKWRIGHT, deceased, and on her own behalf,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

L. JOEL CHASTAIN
ROBERT C. ADAMS
On the Brief
NESS, MOTLEY, LOADHOLT, RICHARDSON & POOLE
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Barnwell, SC 29812
(803) 259-9900

TIMOTHY E. EBLE
Counsel of Record
NESS, MOTLEY, LOADHOLT, RICHARDSON & POOLE
151 Meeting Street
Suite 600
Charleston, SC 29402
(803) 577-6747

Attorneys for Respondents

70731
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21
Lutz Appellate Services, inc.

LIST OF ALL PARTIES TO THE PROCEEDINGS

The respondents are correctly identified in the caption. Timothy E. Eble of Ness, Motley, Loadholt, Richardson & Poole, P.A., is counsel of record for all respondents. L. Joel Chastain and Robert C. Adams of Ness, Motley, Loadholt, Richardson & Poole, P.A., and Stanley J. Marks and Dena Rosen Epstein of Begam, Lewis, Marks & Wolfe, P.A., are also counsel for all respondents.

All of the respondents join in this brief in opposition.

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APPENDIX

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Respondents request that the Court deny the petition for writ of certiorari seeking review of an opinion of the United States Court of Appeals for the Ninth Circuit. The court of appeals' opinion in these three consolidated cases was unpublished: *Conkwright v. A.C. & S., Inc.*, Nos. 95-16049, 95-16086, 95-16101, slip op. (9th Cir. Nov. 7, 1996). (Pet. App. 1a.) The Ninth Circuit denied Atlas Turner's petition for rehearing and rejected the suggestion for rehearing en banc: *Conkwright v. A.C. & S., Inc.*, Nos. 95-16049, 95-16086, 95-16101, slip op. (9th Cir. Dec. 20, 1996, and Dec. 30, 1996). (Pet. App. 62a.)

STATEMENT OF JURISDICTION

This Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. § 1254 (1). The questions presented for review in the petition were decided by the Ninth Circuit in opinions entered more than two years before entry of the opinion petitioner now asks the Court to review: *Straub v. A.P. Green, Inc.*, 38 F.3d 448 (9th Cir. 1994) (Pet. App. 15a), *Simberger* [*sic*] *v. The Celotex Corp.*, No. 94-15095, slip op. (9th Cir. Oct. 17, 1994) (Pet. App. 11a); and *Conkwright v. AC&S, Inc.*, No. 94-15066, slip op. (9th Cir. Oct. 17, 1994). (Pet. App. 13a.) Atlas Turner did not petition the Court for writ for certiorari seeking review of those opinions. Petitioner now seeks to present questions decided by the Ninth Circuit in 1994, not the questions decided by the Ninth Circuit in the unreported opinion entered on November 7, 1996: *Conkwright v. AC&S, Inc.*, Nos. 95-16049, 95-16086 and 95-16101, slip op. (9th Cir. Nov. 7, 1996). (Pet. App. 1a.) The time for presentation of the questions arising from the 1994 opinions has long since expired and Atlas Turner's arguments on those questions may not properly be considered now. *See* pp. 8-13 below.

STATUTES AND RULE INVOLVED

28 U.S.C. § 1254 (1994) Courts of appeals; certiorari; certified questions

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

28 U.S.C. § 2101 (1994) Supreme Court; time for appeal or certiorari; docketing; stay

* * *

> (c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days. . . .

Rule 13, Rules of the Supreme Court of the United States. Review on Certiorari; Time for Petitioning

> 1. Unless otherwise provided by law, a petition for a writ of certiorari to review a

judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.

2. The Clerk will not file any petition for a writ of certiorari that is jurisdictionally out of time. See, *e.g.*, 28 U.S.C. § 2101(c).

3. The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. A suggestion made to a United States court of appeals for a rehearing en banc is not a petition for rehearing within the meaning of this Rule unless so treated by the United States court of appeals.

STATEMENT OF THE CASE

Respondents respectfully bring to the Court's attention additional facts to clarify petitioner's statement of the case and also to correct certain misstatements in the petition.

Petitioner fails to explain to the Court that, of the three cases involved, two *(Straub* and *Simburger)* were consolidated with two additional cases on October 30, 1985, by order of the district court. (Brief in Opp. App. 1a.) Petitioner also states that it "did not receive notice of these default judgments [in all three cases], by mail, personal service or otherwise." (Pet. 10.) If this statement is correct, petitioner would be hard put to explain the following sequence of dates: default judgment against petitioner in *Straub* was entered on April 1, 1991 (Pet. App. 58a); petitioner moved to set aside the default judgment in *Straub* on May 7, 1991 (Brief in Opp. App. 3a); and petitioner's motion was supported by the affidavit of its in-house counsel, Alain Dulude, dated April 25, 1991. (Pet. App. 66a.) Clearly, petitioner received notice of the *Straub* default judgment in some manner, in order to file a motion to set aside the default judgment some five weeks after its entry and to support its motion with an affidavit dated some three weeks after its entry.

Petitioner also makes no effort to explain the puzzling sequence of events concerning the *Simburger* and *Conkwright* default judgments and subsequent related pleadings. For example, the default judgment in *Simburger* was entered on March 8, 1988 (Pet. App. 61a), and the default judgment in *Conkwright* was entered on October 7, 1988. (Pet. App. 60a.) Yet, petitioner did not file motions to set these default judgments aside until August 1993 (Brief in Opp. App. 5a, 7a), both motions supported by affidavits dated July 16, 1993, by its in-house

counsel at the time, Richard Dufour. (Pet. App. 72a and 69a.)[1] Petitioner offers no explanation concerning how its local counsel moved so promptly to set aside the *Straub* default judgment, yet did nothing concerning the *Simburger* default judgment, entered more than three years earlier than the judgment in *Straub*, a case with which *Simburger* had been consolidated since 1985. Petitioner seeks to side-step such questions by stating that it never received any notice whatsoever of the default judgments in one sentence, followed immediately by this contradictory statement: "As its local defense counsel learned of these default judgments entered against it, Atlas Turner filed motions to set aside the default judgments. . . ." (Pet. 10-11.) It is obvious that petitioner *did* receive notice of the default judgments, else its local defense counsel never would have filed the motions to set the judgments aside. Petitioner merely obfuscates this issue with its evasive, contradictory, and disingenuous statements.

Petitioner also cites several provisions of the Foreign Sovereign Immunities Act of 1976 ("FSIA") in its petition and devotes six pages of its argument to the proposition that this Court should interpret certain provisions of the FSIA, which the various federal courts have allegedly interpreted inconsistently and over which the Ninth and Sixth Circuits allegedly are in conflict, because "both executive and congressional concerns are embodied in the FSIA." (Pet. 14-20.) Petitioner goes on to argue that the Ninth and Sixth Circuit conflict is over the issue whether a copy of a default judgment must be served on an instrumentality of a foreign sovereign. (Pet. 20-23.) To this end, petitioner quotes *Antoine v. Atlas Turner*, 66 F.3d 105 (6th Cir. 1995), for the proposition that, unlike the Ninth Circuit in *Straub*, the Sixth Circuit requires that a default judgment be served on the instrumentality itself,

1. Counsel for respondents formally served petitioner with the *Simburger* and *Conkwright* default judgments on June 7, 1993. (Brief in Opp. App. 9a.)

i.e., petitioner Atlas Turner. (Pet. 21.) Petitioner misinterprets the holding of the court in *Antoine*, even after quoting it in the petition. The court did not say that a copy of the default judgment should be served upon the instrumentality; it said that such judgment, "including judgments against agents and instrumentalities . . . , should be sent to the foreign state." (Pet. 21.) Nor does petitioner, in its extensive review of the legislative history of the FSIA, ever indicate just why a copy of the default judgment should be served in any event. The legislative history makes the reason for service of the default judgment perfectly clear, and also indicates why the FSIA is completely silent as to *when* the default judgment must be served:

> (c) *Necessity of court order following reasonable notice.* — Section 1610(c) prohibits attachment or execution under sections 1610(a) and (b) unless the court has issued an order for such attachment and execution. . . . This subsection contemplates that the courts will exercise their discretion in permitting execution. Prior to ordering attachment and execution, the court must determine that a reasonable period of time has elapsed following the entry of judgment, or in cases of a default judgment, since notice of the judgment was given to the foreign state under section 1608(e). . . .

H.R. Rep. No. 94-1487 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6629 ("House Report").

In other words, the main purpose in serving a copy of any judgment rendered against a foreign state or its instrumentality is to give notice of the judgment *prior to execution*. Rather than

imposing any deadline for the service of the judgment, including a default judgment, Congress obviously intended for a period of time to pass between notice of the judgment and any execution upon the judgment. Because respondents have not yet executed on these default judgments and petitioner has received copies of the judgments, § 1608(e) has been satisfied. Moreover, following entry of judgment and notice of the judgment required by § 1608(e), § 1610(c) requires a court order for attachment and execution. Petitioner has not, and cannot, state that respondents have made any attempt whatsoever to execute upon the default judgments at issue. Pursuant to § 1610(c), petitioner could not, under any circumstances, even attempt to execute without court approval and an order allowing execution.

As the above demonstrates, petitioner had notice of the default judgment in *Straub* no later than April 25, 1991, and had notice of the default judgments in *Simburger* and *Conkwright* no later than July 16, 1993, as evidenced by the affidavits of its in-house counsel. Since respondents did not, and could not, even attempt to execute upon their judgments without court approval and an order, and have, in fact, made no attempts to execute as of this date, petitioner's arguments concerning the urgent need for this Court's interpretation of one sentence of § 1608(e) of the FSIA, because of executive and legislative concerns, are completely unfounded. Any judgment, including a default judgment, is valueless if the judgment creditor cannot execute on the judgment. As § 1610(c) indicates, and as the House Report makes perfectly clear, there can be no execution upon a judgment against a foreign sovereign or its instrumentality unless notice of the judgment has been given and the court, in its discretion, has determined that sufficient time has passed since the judgment was entered and the entity received actual notice.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS NO JURISDICTION TO CONSIDER THE QUESTIONS PRESENTED OR THE PETITIONER'S ARGUMENTS ON THOSE QUESTIONS.

In its petition, petitioner Atlas Turner presents the following questions for review:

> 1. Whether Respondents were required to serve Petitioner Atlas Turner, Inc., a Canadian Crown Corporation, with the default judgments under § 1608(e) of the Foreign Sovereign Immunities Act of 1976.
>
> 2. Whether the default judgments against Petitioner Atlas Turner, Inc. should be set aside where Respondents did not serve Atlas Turner, Inc. with the default judgments and where Respondents' service of original process on Atlas Turner, Inc. did not strictly comply with § 1608(b) of the Foreign Sovereign Immunities Act of 1976.

(Pet. i).

These questions were decided by the Ninth Circuit on October 17, 1994 (Pet. App. 11a, 13a, 15a), more than two years before the filing of this petition. It is clear from the opinion of the Ninth Circuit filed on November 7, 1996, that the Ninth Circuit did not address the questions presented in Atlas Turner's petition for writ of certiorari. (Pet. App. 2a.) In the 1996 opinion, the Ninth Circuit held as follows:

> Atlas contests several of the district court's factual findings. Since they are all supported by the record, we decline to find any of them to be clearly erroneous.
>
> Atlas also disputes the district court's ruling that Atlas received actual notice of the complaints[.] We find that the district court properly placed the burden of proof upon plaintiffs. Further, this court cannot fault the district court's conclusion that Atlas received actual notice of the lawsuits as a result of plaintiffs' attempted service, particularly since a determination of actual notice is a highly fact-bound inquiry. . . .
>
> Atlas also contends that the district court erred by failing to follow the "law of the case" as set forth in *Straub I*. The law of the case doctrine prevents a court from relitigating an issue previously decided by the same or higher court in the identical case. . . .
>
> In *Straub I*, this [c]ourt disapproved of the district court's finding that Atlas had actual notice. However, the court remanded for further consideration of actual notice since it was not a dispositive issue before the district court. The law of the case doctrine does not apply because the district court considered substantially different facts on remand. . . .

(Pet. App. 3a) (citations omitted).

From the foregoing, there is little question that the second Ninth Circuit opinion in *Conkwright* simply affirmed the district court's factual findings and refusal to apply the law of the case doctrine in a situation where it had considered "substantially different facts on remand." These questions are simply not the questions presented for this Court's review in the petition.

The questions presented by petitioner in the present petition were decided by the Ninth Circuit in the October 17, 1994, opinion. For example, in construing § 1608 of the FISA, the Ninth Circuit held that, because Atlas Turner was an instrumentality of a foreign state, rather than a foreign state or political subdivision thereof, it "did not need to be served with a copy of the default judgment." (Pet. App. 28a.)

The Ninth Circuit further held that "substantial compliance," rather than the strict compliance now urged by petitioner, sufficed for the FSIA:

> We formally adopt a substantial compliance test for the FSIA. . . .
>
> Applying the substantial compliance test, Straub's failure to dispatch the complaint by the clerk of court did not per se deprive the district court of jurisdiction. The substantial compliance test, however, is satisfied only if Atlas Turner received actual notice of the lawsuit. The burden of proving actual notice remains with Straub. . . .

(Pet. App. 26a) (citation omitted).

There can be no dispute that these holdings in *Straub I* formed the basis for the questions now presented in this petition.

Nor can there be any dispute that the second Ninth Circuit opinion in these cases, purportedly the basis for the petition, had nothing to do with the Ninth Circuit's earlier construction of the FSIA: the second opinion merely affirmed the district court's factual finding on remand that petitioner did receive actual notice of the three lawsuits as a result of respondents' service of process on it, and the district court's refusal to apply the law of the case doctrine in a case on remand, where substantially different facts were presented. The situation is made perfectly clear by petitioner's statement of jurisdiction and the issues presented for review in its brief on the second appeal in *Conkwright*:

> It bears noting that the present appeal follows a narrow determination by the district court *solely* on the issue of actual notice. This determination followed a remand issued by this Court in the present case following its decision in *Straub v. A.P. Green, Inc.*, 38 F.3d 448 (9th Cir. 1994). In that case, this Court reversed the district court's denial of a motion to set aside a default judgment. In doing so, this Court left unresolved the issue of actual notice, and remanded the case to the district court to reconsider that issue. This Court, in the remand language of the present case, following its decision in *Straub I*, *supra*, stated that if Atlas Turner had actual notice of the complaint, the default was proper and judgment may enter. . . .

(Brief in Opp. App. 13a, 14a) (Emphasis added).

The following are the sole issues that were raised by petitioner in the second appeal to the Ninth Circuit:

ISSUES PRESENTED FOR REVIEW

I. THE DISTRICT COURT ERRED IN FINDING THAT ATLAS TURNER HAD ACTUAL NOTICE OF THE LAWSUIT AGAINST IT IN 1986

A. *THE DISTRICT COURT ABUSED ITS DISCRETION IN FAILING TO FOLLOW THE LAW OF THE CASE AS DECIDED IN STRAUB I*

B. *THE DISTRICT COURT ERRED IN CONCLUDING THAT THERE WAS NEW EVIDENCE TO SUPPORT A FINDING OF ACTUAL NOTICE*

C. *THE DISTRICT COURT ERRED IN REVISITING THE QUESTION OF STRAUB'S METHOD OF SERVICE*

D. *THE DISTRICT COURT ERRED IN PLACING THE BURDEN OF PROOF UPON ATLAS TURNER*

(Brief in Opp. App. 14a).

In summary, the petition, presenting the questions therein, should have been filed within ninety days of the Ninth Circuit's decision in *Straub I*, or approximately by January 15, 1995. Because it was filed over two years later, on February 4, 1997,

the petition is untimely under 28 U.S.C. § 2101(c) and this Court's Rules 13.1 and 13.3. *See also Federal Trade Commission v. Minneapolis-Honeywell Regulator*, 344 U.S. 206 (1952) (holding that the statutes limiting the appellate jurisdiction of the Supreme Court are not to be applied in such a way as to permit tolling of time limitations because of some event that occurs after the appealed judgment is rendered but that is of no import to matters to be dealt with on review by the Supreme Court). Therefore, the petition is improper under Rule 13.2, this Court cannot properly exercise jurisdiction over this case, and the petition should be dismissed or denied.

II.

IN ANY EVENT, THE QUESTIONS PRESENTED FOR REVIEW BY PETITIONER DO NOT RAISE ANY SIGNIFICANT ISSUES CONCERNING THE FOREIGN SOVEREIGN IMMUNITIES ACT THAT ARE SUFFICIENT TO WARRANT THIS COURT'S REVIEW.

Petitioner argues that Supreme Court review is needed to resolve a conflict between the circuit courts of appeal in interpreting the last sentence of 28 U.S.C. § 1608(e). In *Straub I*, *supra*, the Ninth Circuit held that § 1608(e) does not require service of a default judgment on a foreign instrumentality. (Pet. App. 28a.) The Sixth Circuit, in *Antoine*, *supra*, held that the statute requires either service of the default judgment upon the defendant or a showing that the defendant had actual notice of the default judgment. 66 F.3d at 109.[2]

---

2. The Sixth Circuit first held that "a default judgment against a 'foreign state, a political subdivision thereof, *or an agency or instrumentality* of a foreign state' . . . shall be sent to 'the foreign state or political subdivision.' " *Antoine*, 66 F.3d at 109. Next, the court held that, when copies of such a (Cont'd)

Since the enactment of the FSIA in 1976, United States courts of appeals have had occasion to interpret this sentence in only *Straub I* and *Antoine*. Not surprisingly, both of these cases involved the same defendant (petitioner) — a defendant that has made a practice of defaulting in virtually every lawsuit that has been filed against it since 1985.[3]

(Cont'd)
default judgment are not served pursuant to § 1608(e), the judgment is voidable, not void, because the service requirement is a condition subsequent to the entry of an otherwise proper judgment. 66 F.3d at 109. Finally, even if Atlas did not have actual notice that the default judgments had been entered, the Sixth Circuit held that the judgments were not necessarily void. *Id.* at 110. The court then remanded the case for further findings on actual notice and a determination whether the judgments should be set aside, in the absence of actual notice. *Id.* at 109-10. Significantly, the Sixth Circuit's ruling on § 1608(e) turned on actual notice: "[I]f Atlas did have actual notice, the judgments could not be vacated on § 1608(e) grounds." 66 F.3d at 109. Thus, the Sixth Circuit rule, like that of the Ninth Circuit, is that substantial compliance with the FSIA service requirements for default judgments suffices, and strict compliance is not required.

3. According to the court in *Antoine*:

> On June 5, 1985, Atlas' attorney, James Conroy, filed a Notice of Withdrawal as attorney for Atlas with the District Court. . . . Conroy's withdrawal was caused by a coverage dispute that developed between Atlas and Chubb & Son [Atlas' insurer], which had retained Conroy on behalf of Atlas. . . .
>
> On October 24, 1985, plaintiffs sought entry of default against Atlas. In support of their application for entry of default, plaintiffs filed an affidavit given by plaintiffs' counsel [stating that Atlas] had indicated it would no longer defend the underlying cases, and that

(Cont'd)

Thus, considering petitioner's default in the *Antoine* cases in 1985 and its default in these cases in 1986, in the context of its posture toward the U.S. asbestos litigation, as stated in its in-house counsel's letter in September 1985, it is clear that these defaults were neither accidental nor the result of lack of notice of any kind, but rather the result of a deliberate choice to go into default. Given the unusual posture petitioner has taken toward lawsuits filed against it, the likelihood of this issue being revisited by federal courts in the future is not great. The resources of the United State Supreme Court would be better utilized in deciding issues of a more widespread and substantive nature.

(Cont'd)

> since June 5, 1985, Atlas had not in fact defended itself in the underlying cases.

Antoine, 66 F.3d at 107-08.

Furthermore,

> [i]n two letters, both dated September 24, 1985, from Dulude [Atlas' in-house counsel] to Conroy on Atlas and Bell Asbestos Mines, Limited (hereinafter "Bell") letterhead, respectively, Dulude stated:
>
> > Over the last two years, the posture of Bell Asbestos Mines, Limited and Atlas Turner Inc in the U.S. asbestos litigation has changed considerably. For economic and other consideration, with which you are already acquainted, Bell and Atlas have taken a minimal defense posture and proceeded to default judgments in several cases.

Antoine v. Atlas Turner, Inc., No. 90CV2231, slip. op, (N.D. Ohio Jan. 30, 1997) (denying Atlas Turner's motion to set aside the default judgments on remand) (Brief in Opp. App. 18a).

Petitioner also argues that Supreme Court review is necessary because the lower courts are "inconsistent" in their interpretations of the service requirements of § 1608. What petitioner regards as "inconsistent" is merely the flexible application of a statute in a manner that affords justice to individual litigants. In making its argument, petitioner intermingles citations to cases involving § 1608(a) with those involving § 1608(b). However, those cases dealing with § 1608(a) are not relevant to the questions presented by petitioner. Section 1608(a) provides requirements for service of process upon a foreign state or subdivision; § 1608(b) provides methods for service of process upon a foreign agency or instrumentality. The lower courts have already determined that petitioner is an instrumentality of a foreign state, and petitioner does not now contest that determination. Accordingly, the provisions of § 1608(b) and not § 1608(a) apply to this case.

This distinction is significant. As noted by the D.C. Circuit,

> [s]ection 1608(b)(3) allows simple delivery "if reasonably calculated to give actual notice," showing that Congress was there concerned with substance rather than form; but the analogous subsection of section 1608(a) says nothing about actual notice. The distinction is neatly tailored to the differences between "foreign states" and "agencies or instrumentalities." The latter, typically international commercial enterprises, often possess a sophisticated knowledge of the United States legal system that other organs of foreign governments may lack.

Transaero, Inc. v. La Fuerza Area Boliviana, 30 F.3d 148, 154 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 1101 (1995).

Accordingly, the D.C. Circuit, although holding that strict compliance with § 1608(a) is required, recognized that § 1608(b) may be satisfied by substantial compliance coupled with actual notice to the foreign entity. 30 F.3d at 154. *See also Finamar Investors, Inc. v. Republic of Tadjikistan*, 889 F. Supp. 114, 117-18 (S.D.N.Y. 1995) (discussing the rationale for requiring strict compliance with § 1608(a) and only substantial compliance with § 1608(b)).

Generally, the federal courts have held that § 1608(b) is satisfied by service that gives adequate notice to the foreign agency or instrumentality, even though the service may not meet all of the technical requirements of the statute. *Transaero*, *supra*, 30 F.3d at 153. Moreover, the United States circuit courts of appeals that have dealt with this issue appear uniformly to agree that substantial compliance with § 1608(b), coupled with actual notice to the defendant, is all that is required to perfect service on an agency or instrumentality. *See Straub I* (Pet. App. 26a); *Sherer v. Construcciones Aeronauticas, S.A.*, 987 F.2d 1246, 1250 (6th Cir.), *cert. denied*, 510 U.S. 818 (1993); *Harris Corp. v. National Iranian Radio and Television*, 691 F.2d 1344, 1352 (11th Cir. 1982); *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 821 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982).

Petitioner cites four cases for the proposition that some federal courts require strict compliance with § 1608(b): *Shell Oil Co. v. M/V Itanage*, 830 F. Supp. 1423 (M.D. Fla. 1993); *First City, Texas-Houston v. Rafidain Bank*, No. 90-7360, 1992 U.S. Dist. LEXIS 15235 (S.D.N.Y. Oct. 6, 1992); *Lippus v. Dahlgren Mfg. Co.*, 644 F. Supp. 1473 (E.D.N.Y. 1986); and *Unidyne Corp. v. Aerolineas Argentinas*, 590 F. Supp. 391 (E.D. Va. 1984). (Pet. 25-26) In each of these cases, the plaintiff failed to comply strictly with § 1608(b). Petitioner claims these decisions establish "inconsistency" among the federal court decisions. However, the mere fact that some courts require strict

compliance with § 1608(b) does not demonstrate that cases are receiving disparate treatment under the FSIA. A careful review of these cases indicates the court in each ensured that the plaintiff would not lose the opportunity to have the case heard because of a technical failure to comply with the service statute. In three of the cases, the courts refused to dismiss the actions and permitted the plaintiffs a reasonable amount of time in which to perfect service. *See Shell Oil*, 830 F. Supp. at 1426; *First City*, 1992 U.S. Dist. LEXIS 15235 at 8; *Lippus*, 644 F. Supp. at 1479. In the fourth case, the court dismissed the plaintiff's action but clearly contemplated that the plaintiff would refile and perfect service of process. *See Unidyne*, 590 F. Supp. at 397 (dismissing without prejudice and refusing to discuss an issue that might be raised "if proper service is effected later").

The difference between these four decisions and those applying a substantial compliance analysis does not evince a disparity in the administration of justice from case to case. In general, the courts dealing with service of process under § 1608(b) administer justice in a flexible yet consistent fashion. Litigants in all cases cited, as well as in the present case, have been ensured a fair and consistent result. No need exists for this Court to decide whether strict or substantial compliance with 28 U.S.C. § 1608(b) is required.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA IN *STRAUB, ET. UX. v. A.P. GREEN, INC.* DATED OCTOBER 30, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Date October 30, 1985

No. CIV 85-431 PHX CLH (LEAD) [STRAUB]
CIV 85-432 PHX PGR
CIV 85-433 PHX CAM
CIV 85-434 PHX EHC
CIV 85-435 PHX RCB [SIMBURGER]
(CONSOLIDATED)

HAROLD E STRAUB, ET. UX.,

PLAINTIFF,

vs.

A. P. GREEN, INC.,

DEFENDANT.

IN THE ABOVE MATTER you are advised that the cases are now consolidated per Judge Hardy's order of October 28, 1985. In accordance with Local Rule 3(e), all pleadings will be filed in the lower numbered case. Therefore, future pleadings pertaining to either of these actions will be filed in CIV 85-431 PHX CLH, and the title page of the documents should be prepared as shown on the attached example.

Appendix A

Any document submitted for filing which does not conform with these instructions will be rejected.

IT IS FURTHER ORDERED resetting the hearing on all motions to dismiss to November 25, 1985 @ 2:00 pm.

RICHARD H. WEARE

By s/ Milva Bunch
Signature
DEPUTY CLERK

cc: All counsel of record

APPENDIX B — MOTION AND ORDER TO SET ASIDE DEFAULT JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA IN *STRAUB, ET UX. v. A.P. GREEN, INC., ET AL.* DATED MAY 6, 1991

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

NO. CV 85-0431 PHX SMM

HAROLD E. STRAUB, et ux.,

Plaintiffs,

v.

A.P. GREEN, INC., et al.,

Defendants.

MOTION AND ORDER TO SET ASIDE DEFAULT JUDGMENT

Defendant, Atlas Turner, Inc., through undersigned counsel, hereby moves this Court, pursuant to the provisions of Rule

60(b)(4), Fed. R. Civ. P., to enter its order setting aside the Default Judgment ordered by this court on or about April 1, 1991, for the reason that such judicial determination is void under Rule 60(b), Fed. R. Civ. P., due to this court's lack of personal jurisdiction over Atlas Turner, Inc.

This motion is supported by the accompanying Memorandum of Points and Authorities, and Affidavit of Alain Dulude, submitted herewith, which are incorporated herein by this reference.

DATED this 6th day of May, 1991.

HOLLOWAY & THOMAS, P.C.

By s/ Craig A. McCarthy
Thomas P. Burke, II
Craig A. McCarthy
Attorneys for Defendant Atlas Turner

APPENDIX C — MOTION TO SET ASIDE DEFAULT JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA IN *SIMBURGER v. THE CELOTEX CORPORATION, ET AL.* DATED JULY 26, 1993

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(602) 240-6670

Attorneys for Defendant Atlas Turner, Inc.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

NO. CIV. 85-435 PHX RCB

(Oral Argument Requested)

(Assigned to the Honorable Robert C. Broomfield)

BERNARD F. SIMBURGER and ROXIE L. SIMBURGER, husband and wife,

Plaintiffs,

vs.

THE CELOTEX CORPORATION, et al.,

Defendants.

Appendix C

MOTION TO SET ASIDE DEFAULT JUDGMENT

Defendant Atlas Turner, Inc., by and through counsel undersigned, hereby moves this Court, pursuant to the provisions of Rule 60(b)(4), Federal Rules of Civil Procedure, to enter an order setting aside the Default Judgment entered by this Court on March 3, 1988, for the reason that such Judgment is void under Rule 60(b), Federal Rules of Civil Procedure, due to this Court's lack of personal jurisdiction over Atlas Turner, Inc.

This motion is supported by the accompanying Memorandum of Points and Authorities and Affidavit of Richard Dufour (attached as Exhibit "1"), submitted herewith, which are incorporated herein by this reference.

. . .

RESPECTFULLY submitted this 26th day of July, 1993.

HOLLOWAY ODEGARD & SWEENY, P.C.

s/ Pete Kelly
Kevin B. Sweeney
Peter C. Kelly, II
2700 North Central Avenue
Suite 210
Phoenix, Arizona 85004
Attorneys for Defendant
Atlas Turner, Inc.

APPENDIX D — DEFENDANT ATLAS-TURNER'S MOTION TO SET ASIDE DEFAULT JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA IN *CONKWRIGHT v. A.C.&S., INC. ET AL.* DATED JULY 30, 1993

Kevin B. Sweeney, #11737
Peter C. Kelly, II, #014503
HOLLOWAY ODEGARD & SWEENEY, P.C.
Suite 210
2700 North Central Avenue
Phoenix, Arizona 85004
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Attorneys for Defendant Atlas Turner, Inc.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

NO. CIV 85-155-T-RMB

(Assigned to the Hon. Richard M. Bilby)

WILLIAM F. CONKWRIGHT and HELEN CONKWRIGHT, husband and wife,

Plaintiffs,

vs.

A. C. & S., INC. et al.,

Defendants.

Appendix D

DEFENDANT ATLAS-TURNER'S MOTION TO SET ASIDE DEFAULT JUDGMENT

Defendant Atlas Turner, Inc., by and through counsel undersigned, hereby moves this Court, pursuant to the provisions of Rule 60(b)(4), Federal Rules of Civil Procedure, to enter its Order Setting Aside the Default Judgment ordered by this Court on or about October 7, 1988, for the reason that such judgment is void under Rule 60(b), Federal Rules of Civil Procedure, due to this Court's lack of personal jurisdiction over Atlas Turner, Inc.

This motion is supported by the accompanying Memorandum of Points and Authorities and Affidavit of Richard Dufour (attached as Exhibit "1"), submitted herewith, which are incorporated herein by this reference.

RESPECTFULLY submitted this 30th day of July, 1993.

HOLLOWAY ODEGARD & SWEENY, P.C.

s/ Kevin B. Sweeney
Kevin B. Sweeney
Peter C. Kelly, II
2700 North Central Avenue
Suite 210
Phoenix, Arizona 85004
Attorneys for Defendant
Atlas Turner, Inc..

APPENDIX E — LETTER FROM PAUL A. JOZEF TO MR. KEVIN B. SWEENEY DATED JUNE 7, 1993

12842-28
12842-42

June 7, 1993

Mr. Kevin B. Sweeney
HOLLOWAY ODEGARD & SWEENEY
2700 North Central, Suite 210
Phoenix, Arizona 85004

Dear Kevin:

RE: Simburger v. Atlas-Turner, Inc., et al.
Conkwright v. Atlas-Turner, Inc., et al.

Attached are some discovery requests in the two above captioned cases. I have also included a copy of the original Complaint filed in each case, and the Default Judgment rendered.

As you represent Atlas-Turner locally, service upon you should be sufficient, and I would expect you to forward this discovery to the company for response.

Thank you for your prompt attention to this matter.

Very truly yours,

Paul A. Jozef
For the Firm

Appendix E

PAJ:nlj

Enclosures - 1. Notice of Service of Plaintiffs Conkwright's First Set of Non-Uniform Interrogatories to Defendant Atlas-Turner, Inc.

2. Plaintiffs Conkwright's First Set of Non-Uniform Interrogatories to Defendant Atlas-Turner, Inc.

3. Notice of Service of Plaintiffs Conkwright's Request for Production of Documents to Defendant Atlas-Turner, Inc.

4. Plaintiffs Conkwright's Request for Production to Defendant Atlas-Turner, Inc.

5. Plaintiffs Conkwright's Default Judgment Order.

6. Notice of Service of Plaintiffs Simburger's First Set of Non-Uniform Interrogatories to Defendant Atlas Turner, Inc.

7. Plaintiffs Simburger's First Set of Non-Uniform Interrogatories to Defendant Atlas-Turner, Inc.

8. Notice of Service of Plaintiffs Simburger's Request for Production of Documents to Defendant Atlas-Turner, Inc.

9. Plaintiffs Simburger's Request for Production to Defendant Atlas-Turner, Inc.

Appendix E

10. Plaintiffs Simburger's Judgment against Atlas-Turner, Inc.

11. Plaintiffs Conkwright's original and First Amended Complaints.

12. Plaintiffs Simburger's original and First Amended Complaints.

APPENDIX F — EXCERPTS OF APPELLANT'S OPENING BRIEF IN *CONKWRIGHT v. A.C.&S., INC. PENN CORP. AND ATLAS TURNER, INC.* DATED SEPTEMBER 25, 1995

IN THE UNITED STATES COURT OF APPEALS NINTH CIRCUIT

U.S. Court of Appeals
Docket No. 95-16049

District Court
Docket No. 95-00133-SMM

HELEN CONKWRIGHT, as surviving spouse of WILLIAM F. CONKWRIGHT deceased, and on her own behalf,

Plaintiffs-Appellees,

v.

A C & S, INC., Penn Corp.,

Defendant,

and

ATLAS TURNER, INC.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Appendix F

APPELLANT'S OPENING BRIEF

Paul W. Holloway - 002046
Kevin B. Sweeney - 011737
HOLLOWAY ODEGARD & SWEENEY, P.C.
3101 North Central Avenue
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Attorneys for Defendant-Appellant
Atlas-Turner, Inc.

* * *

STATEMENT OF JURISDICTION

This appeal arises initially from a district court denial of a motion to set aside a default judgment entered against Atlas Turner. This court, therefore, has jurisdiction pursuant to 28 U.S.C. § 1291.

It bears noting that the present appeal follows a narrow determination by the district court solely on the issue of actual notice. This determination followed a remand issued by this Court in the present case following its decision in *Straub v. A.P. Green, Inc.*, 38 F.d 3d 448 (9th Cir. 1994)[1]. In that case, this Court reversed the district court's denial of a motion to set aside a default judgment. In doing so, this Court left unresolved the issue of actual notice, and remanded the case to the district court to reconsider that issue. This Court, in the remand language of

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1. All further references to this Court's previous decision will be to *Straub I*, and to the specific pages as appropriate.

the present case, following its decision in *Straub I, supra,* stated that if Atlas Turner had actual notice of the complaint, the default was proper and judgment may enter. Because the district court found actual notice existed, the effect of the remand, coupled with the district court's ruling, makes the district court's order a final order subject to appeal pursuant to 28 U.S.C. § 1291 . . .

* * *

ISSUES PRESENTED FOR REVIEW

I. DISTRICT COURT ERRED IN FINDING THAT ATLAS TURNER HAD ACTUAL NOTICE OF THE LAWSUIT AGAINST IT IN 1986

A. *THE DISTRICT COURT ABUSED ITS DISCRETION IN FAILING TO FOLLOW THE LAW OF THE CASE AS DECIDED IN STRAUB I*

B. *THE DISTRICT COURT ERRED IN CONCLUDING THAT THERE WAS NEW EVIDENCE TO SUPPORT A FINDING OF ACTUAL NOTICE*

C. *THE DISTRICT COURT ERRED IN REVISITING THE QUESTION OF STRAUB'S METHOD OF SERVICE*

D. *THE DISTRICT COURT ERRED IN IMPLICITLY PLACING THE BURDEN OF PROOF UPON ATLAS TURNER*

* * *

Appendix F

. . . and that Simburger's burden of proof could not be satisfied without Atlas Turner's cooperation. Of course there was absolutely no evidence before the district court, nor before this Court, that Atlas Turner had somehow refused to cooperate in discovery or in providing information.

Simply put, this is a fairly simple issue. The district court failed to properly apply the Law of the Case doctrine and came to some legal and factual conclusions which were directly in contravention of this Court's previous decision in *Straub I*. This Court is left with no alternative but to reverse the district court's order finding actual notice, must vacate the district court's order of May 16, 1995, and enter an order remanding this case with directions to the district court to vacate the default judgment entered against Atlas Turner. No other conclusion is possible. It is therefore respectfully requested that this Court so order.

RESPECTFULLY SUBMITTED this 25th day of September, 1995.

HOLLOWAY ODEGARD & SWEENEY, P.C.

By s/ Kevin B. Sweeney
Paul W. Holloway
Kevin B. Sweeney
3101 N. Central Avenue, Suite 1200
Phoenix, Arizona 85012
Attorneys for Defendant/Appellant
Atlas-Turner, Inc.

APPENDIX G — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION IN *ANTOINE, ET AL. v. ATLAS TURNER, INC.* FILED JANUARY 30, 1997

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:90CV2231

HON. GEORGE W. WHITE

EDWARD ANTOINE, et al.,

Plaintiff,

vs.

ATLAS TURNER, INC.,

Defendant.

MEMORANDUM AND ORDER

This matter is before the Court on remand from the Sixth Circuit Court of Appeals wherein the district court's denial of Defendant Atlas Turner, Inc.'s (hereinafter "Atlas") Motion for Relief from judgment was reversed, in part.

This is one of four consolidated asbestos personal injury cases in which default judgments were obtained against defendant Atlas, a Canadian supplier, in 1985. Plaintiffs successfully moved to collect on these judgments from Atlas's

insurers pursuant to Ohio Revised Code §3929.06. Atlas subsequently filed a Motion for Relief from Judgment in accordance with Rules 55(b) and 60(b) of the Federal Rules of Civil Procedure, which the District Court denied. On appeal, the Sixth Circuit affirmed, in part, and reversed, in part, the district court's decision. The issue of whether Atlas received actual notice of the plaintiffs' application for default judgment is now before the Court on remand.

During a status call before this Court, discovery was permitted through August 2, 1996 on the remand issue. The parties fully briefed the matter and it is now before the Court for review.

The relevant facts in this case center begin with attorney James Conroy (hereinafter "Conroy") who represented Atlas in the underlying asbestos litigation until June 5, 1985. As the Sixth Circuit resolved on appeal, Conroy successfully withdrew as Atlas's counsel by notice to the Court on June 5, 1985.

In a letter, dated July 25, 1985, Conroy advised Alain Dulude (hereinafter "Dulude"), in-house counsel to Atlas, that he attended a hearing regarding his Notice of Withdrawal as Counsel for Atlas in several Ohio asbestos cases. Conroy elaborated in the letter that:

> The Judge inquired as to whether or not Atlas and Bell were aware of the potential ramifications of their failure to appear in these cases. I informed the Court that as far as I knew, Atlas and Bell were aware of the potential judicial remedies which could result from their continued failure to appear and defend. I made it clear, however, that in any

> event Atlas and Bell did not acquiesce to the jurisdiction of this Court.

(Letter from Conroy to Dulude of 7/25/85, at 1).

Atlas subsequently hired counsel, Thomas Meaney, Jr. (hereinafter "Meaney"), to represent its interests in pending asbestos litigation in Northern Ohio. In two letters, both dated September 24, 1985, from Dulude to Conroy on Atlas and Bell Asbestos Mines, Limited (hereinafter "Bell") letterhead, respectively, Dulude stated:

> Over the last two years, the posture of Bell Asbestos Mines, Limited and Atlas Turner Inc in the U.S. asbestos litigation has changed considerably. For economic and other consideration, with which you are already acquainted, Bell and Atlas have taken a minimal defense posture and proceeded to default judgments in several cases. After reviewing the overall situation and in contemplation of additional decisions regarding the position of Bell and Atlas in the U.S. asbestos litigation, I must advise you at this time that all matters involving Bell Asbestos mines Limited and/or Atlas Turner Inc. are to be transferred immediately to Thomas P. Meaney, Jr. Esq. of Burker [sic], Haber & Berick, 300 National City Bank Building, Cleveland, Ohio 44114 U.S.A. You will be contacted shortly by a representative of the Burke, Haber & Berick office to effectuate an orderly and efficient transfer of the files. . . .

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(Letter from Dulude to Conroy of 9/24/85, at 1.)

A carbon copy of this letter was sent directly to Meaney. Meaney never entered an appearance in this matter, although he entered appearances in numerous other cases on behalf of Atlas in Northeast Ohio.

On October 23, 1985, plaintiffs filed a Notice of Application for Judgment in Case No. C-82-344 and three other asbestos litigation cases against Atlas with the Clerk of Courts in the United States District Court, Northern District of Ohio. Plaintiffs sent a copy of the Notice of Application for default judgment directly to Conroy. Conroy admits that he received a copy of the Notice of Application for Default Judgment on October 28, 1985 from the law offices of plaintiffs' attorney, Charles Cloninger (hereinafter "Cloninger"). Conroy stated in his deposition that he immediately contacted Meaney by telephone "to advise him that I had received this document, and I advised him that I was going to send them over to him. We discussed other aspects of the general representation of Bell and Atlas, as far as Tom was concerned, but the main thrust of this conversation was certainly this motion for default judgment." (Conroy Dep. at 17).

In follow up to his conversation with Meaney, Conroy sent a letter to him, dated October 29, 1985, wherein he stated:

> Further, I enclose for your immediate attention a Notice of Application for Judgment which I received on October 28, 1985 from Attorney M. Charles Cloninger. As is apparent from the Notice, Attorney Cloninger is seeking default judgment in

> favor of the above listed plaintiffs for the amounts set forth in the Notice. The hearing is scheduled for Thursday, October 31, 1985 at 2:00 P.M.
>
> At this time I am in the process of preparing our final statement for services to be submitted directly to Atlas. I shall be forwarding the same to the client in the very near future.

(Letter from Conroy to Meaney of 10/29/85, at 2.)

When asked whether he forwarded the letter to either Atlas or Dulude, Meaney stated in his deposition, "I can tell you I probably sent it on. I just can't tell you without having correspondence in front of me that I did." (Meaney Dep. at 14-15.). Regardless of whether he forwarded the letter, Meaney recalls "that when I received the letter, it was a matter of days — two or three days at the very most from the time I got the letter until this hearing was to take place, and that's why I was having telephonic communication between me and Dulude. In those days, I don't think we had faxes." (Meaney Dep. at 12.). Therefore, it is clear Meaney received notice of the default hearing and consequently notified Atlas's in-house counsel, Dulude[1].

A telephone hearing was held before the Court on October 31, 1985 wherein former Chief Judge Thomas D. Lambros orally granted Plaintiffs' motion for default judgment in this and three other asbestos litigation cases. A *Memorandum and Order* was

1. Dulude passed away before the Sixth Circuit remanded this matter to the district court.

subsequently issued on December 17, 1985 by former Chief Judge Lambros entering default judgments against Atlas for sums certain based upon Cloninger's affidavit in support of the motion.

On December 14, 1990, plaintiffs moved to collect from Atlas's insurers on these judgments pursuant to Ohio Revised Code §3929.06. On March 15, 1991, Atlas responded by filing a Motion for Relief from Judgment in accordance with Rules 55(b) and 60(b) of the Federal Rules of Civil Procedure.

The matter was referred to a Magistrate Judge to issue a report and recommendation. In his Report and Recommendation, issued May 19, 1992, the magistrate recommended that Atlas's motion be granted based on the plaintiff's failure to comply with the notice requirement of Rule 55(b), when it served the application for default and the default judgments on Conroy instead of Atlas.

Objections to the Report and Recommendation, as well as, a Brief in Opposition and Reply Brief were filed. Upon completion of all supplemental briefing, the District Court granted Plaintiffs' Objections to the Report and Recommendation; thus, denying Atlas's motion for relief on all grounds.

In response to the district court's denial of its motion for relief from judgment, Atlas appealed to the Sixth Circuit Court of Appeals which held that: "(1) the supplier's attorney's notice of withdrawal was sufficient to end his representation of the supplier, for purposes of determining whether notice to the attorney was notice to the supplier of the application for default judgments; (2) a default judgment that is not served on a foreign state, political subdivision thereof, or agency or instrumentality

thereof under the Foreign Sovereign Immunities Act (FSIA) is voidable, rather than void; and (3) remand was necessary for further proceedings on whether the supplier received actual notice of the applications for default judgments and the judgments themselves." *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105 (6th Cir. 1995).

Atlas argues that it is entitled to total relief from judgment because plaintiffs' claims are defensible as to liability and damages. It maintains that the default judgments were entered against it contrary to the Federal Rules of Civil Procedure, the Foreign Sovereign Immunities Act and due process of law.

The Court will first address whether Atlas had actual notice of the judgments, since an affirmative finding would leave the question of whether the default judgments should be set aside, on that basis, still open for resolution.

ACTUAL NOTICE

A. FOREIGN SOVEREIGN IMMUNITIES ACT

The critical question regarding compliance with service requirements of the FSIA, either substantially or strictly, turns on whether actual notice was received. *Sherer v. Construcciones Aeronauticas, S.A.*, 987 F.2d 1246 (6th Cir.), *cert. denied*, __ U.S. __, 114 S.Ct. 72 (1993). While this Court must address the plaintiffs' compliance under Rule 55, as a foreign entity, Atlas is also entitled to certain protections under the FSIA that this Court should consider first.

The FSIA provides in part:

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> No judgment by default shall be entered by a court of the United states or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

28 U.S.C. §1608(e).

The Congressional intent of the FSIA is that the foreign government be apprised of the pendency of a lawsuit through service "*reasonably calculated* to give actual notice. . . ." 28 U.S.C. §1608(b)(3) (emphasis added). Knowing that an attorney has filed a notice of withdrawal and filing service upon that attorney without concurrently notifying the foreign entity is not reasonably calculated to give actual notice. The fact that notice to Atlas's former attorney *may have* traveled through Atlas's in-house counsel, through an attorney Atlas hired to represent it in its asbestos suits and, ultimately, directly to Atlas does not suggest reasonableness. Additionally, Atlas maintains that it never received direct notice of the judgment. While the evidence suggests that it was possible Atlas may have received notice of the judgments, the Court does not find that this is sufficient. *See e.g., First City, Texas-Houston, N.A. v. Rafidain Bank*, No. 90 Civ. 7360, 1992 WL 296434, at *1, 1992 U.S. Dist. LEXIS 15235, at *5 (S.D. N.Y. Oct. 6, 1992) (that defendant may have been aware of the lawsuit was of little import).

There is no dispute that the plaintiffs were aware that Conroy filed a Notice of Withdrawal in June 1985, four months after they filed their application for default. With this knowledge, the plaintiffs cannot maintain that they complied with the FSIA in

terms of reasonably assuring that the defendants were on notice of their intent to default. Because plaintiffs knew Atlas's attorney no longer intended to represent it in this matter; Atlas's status as a foreign entity and the fact that no subsequent filings were made by Atlas; it was their responsibility to assure that Atlas received direct notice of their intent to seek a default judgment in this matter. Minimally, Atlas should have received notice simultaneous to Conroy's. Serving Conroy the default notice four months *after* he filed notice that he was withdrawing his services on behalf of a foreign entity does not impute actual notice[2] upon Atlas. *See e.g., Vindigni v. Meyer*, 441 F.2d 376, 377-78 (2nd Cir. 1971) (once parties knew plaintiff's attorney had disappeared, defendant should have also sent notice to plaintiff personally, as well as attorney).

Plaintiffs' argument that they believed Conroy's withdrawal was still pending is an exercise in form over substance and particularly unpersuasive in an action as serious as seeking the entry of a default judgment. There is no evidence that plaintiffs knew Atlas retained replacement counsel. Therefore, whether Conroy's efforts eventually reached Dulude was immaterial at the time they forwarded notice to Conroy. What is germane is that plaintiffs knew the chances of notifying a foreign entity would be significantly diminished by service upon an attorney who clearly demonstrated that he was not to be considered counsel of record.

Considering the plaintiffs' awareness of Conroy's notice of

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2. Actual notice is such notice as is positively proved to have been given to a party directly and personally, or such as he is presumed to have received personally because *the evidence within his knowledge was sufficient to put him upon inquiry.* BLACK'S LAW DICTIONARY 712 (6th ed. 1990) (emphasis added).

withdrawal in June 1985, it was *not* reasonable for them to send notice of their intent to pursue default to Conroy four months later. Once Conroy filed his Notice of Withdrawal and no notice of appearance was filed by replacement counsel, it was more reasonable than not to believe that Atlas *was not* a party represented by an attorney. Therefore, in an FSIA action where the defendants have made an appearance, but ceased any relationship with their attorney, plaintiffs have a duty to make service of a notice of intent to seek default directly upon the foreign entity.

B. FEDERAL RULES OF CIVIL PROCEDURE

Atlas maintains that the Federal Civil Rules of Procedure preclude entry of default judgment because plaintiffs' counsel knew that Conroy was no longer representing Atlas in October 1985. Federal Civil Rule 55(b)(2), upon which Atlas relies, provides that: "If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application." FED. R. CIV. P. 55(b)(2) (emphasis added). *See also* FED. R. CIV. P. 5(b) ("[w]henever under these rules service is required . . . to be made upon a party *represented by an attorney* the service shall be made upon the attorney unless service upon the party is ordered by the court.") (emphasis added).

There is no question that plaintiffs provided timely notice. However, the Sixth Circuit has resolved that Conroy was no longer representing Atlas in October 1985. Therefore, plaintiffs were obligated to serve Atlas directly in order to comply with the Federal Civil Rules. Their failure to provide such notice is a failure to provide actual notice.

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Upon due consideration of plaintiffs' failure to provide actual notice of its application for default to the defendant, the Court will now address whether sufficient grounds exist to set aside the default judgment.

MOTION TO SET ASIDE JUDGMENT

The fact that Atlas did not receive actual notice of the default judgments does not automatically mean the judgment should be set aside. *Atlas*, 66 F.3d at 110 (citing *Transaero, Inc. v. LaFuerza Area Boliviana*, 24 F.3d 457, 462 (2d Cir. 1994)). Instead, the Court must consider the equitable factors promulgated by Rule 55 and one of the specific requirements set forth in Rule 60(b). The three equitable factors the Court must consider in setting aside a default entry are: (1) whether the plaintiff will be prejudiced; (2) whether the defendant has a meritorious defense; and (3) whether culpable conduct of the defendant led to the default. *Berthelsen v. Kane*, 907 F.2d 617, 621 (6th Cir.) (citing *United Coin Meter Co. v. Seaboard Coastline RR*, 705 F.2d 839, 845 (6th Cir. 1983), *clarified, reh'g denied*, (6th Cir. 1990).

Once the entry has ripened into a default judgment, Rule 60(b) applies a stricter standard to setting aside such a judgment. *Waifersong Ltd., Inc. v. Classic Music Vending*, 976 F.2d 290, 292 (6th Cir. 1992); *INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc.*, 815 F.2d 391, 398 (6th Cir. 1987) ("A default can be set aside only under the stricter Rule 60(b) standards for setting aside final, appealable orders."), *cert. denied*, 484 U.S. 927 (1987). Rule 60(b) provides, in part, that: "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment . . . for the following reasons: (1) mistake, inadvertence, surprise, or excusable

neglect; . . . (4) the judgment is void; . . . (6) any other reason justifying relief from the operation of the judgment." FED. R. CIV. P. 60(b).

One critical component of Rule 60(b) is that "[t]he motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken." FED. R. CIV. P. 60(b). Since Atlas did not file its Motion for Relief from Judgment until six years after the judgment was entered, its claim for relief under (1) is eliminated. In addition, the Sixth Circuit eliminated relief under (4) when it held that if plaintiffs failed to provide actual notice of the default the judgment would be voidable not void. Therefore, relief under the 'catch-all' criterion of (6) is Atlas's last resort.

The Sixth Circuit has noted that Rule 60(b)(6) "applies in 'exceptional or extraordinary circumstances which are not addressed in the first five numbered sections of the rule." *Thompson v. American Home Assur. Co.*, 95 F.3d 429, 432 (6th Cir. 1996) (citing *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990)). Considering this criteria, as well as, the equitable factors set forth in *United Coin*, the evidence suggests that Atlas displayed a "reckless disregard for the effect of its conduct on judicial proceedings." *INVST Financial Group*, 815 F.2d at 399.

In regard to the first criteria, this is a case in which the defendant has entered an appearance. There is no question that Atlas was aware that this suit was pending inasmuch as it hired counsel to appear in the action. Atlas claims that it was its policy not to permit cases to go into default and admitted that "Attorney Meaney would be taking over the defense of all of the Atlas

cases. . . . Further, by October 1985, Atlas had directly retained counsel, including Meaney, to represent it in the asbestos litigation." However, Meaney inexplicably never entered an appearance in this action. There is no evidence prior to plaintiffs' filing the notice of default that Meaney had anything to do with this action.

The uncontroverted facts contradict Atlas's claim of a no default policy. Atlas does not deny the fact that it hired Meaney to represent it in its asbestos litigation cases. Per Atlas's direction, Meaney instructed Conroy to forward all notices regarding this action to him. There is no dispute that Conroy complied with Meaney's request and communicated the status of this case to Meaney, as well as, the fact that an application for default was filed. While this may not qualify as actual notice for purposes of Rule 55(b)(2) or the FSIA, it does call Atlas's conduct into question when it clearly would have received notice directly had its representative entered an appearance in this action. Therefore, regardless of whether Meaney chose not to participate or was instructed not to participate in this action, Atlas has never provided the Court any explanation as to why it failed to participate in this matter after Conroy's withdrawal.[3]

Atlas cannot now hide behind plaintiffs' failure to provide

3. Atlas attempts to argue that this case 'fell through the cracks' because of the sheer volume of asbestos cases under review. This does not explain, however, why it only reawakened to this action after its insurer notified it of plaintiffs' petition for damages. Atlas's failure to provide a plausible explanation for its six year abstention infers culpable conduct. *See, e.g Amernational Industries v. Action-Tungram*, 925 F.2d 970 (6th Cir. 1991) (delay caused by a flood of defendant's office and relocation, compounded by language barrier plus cultural, governmental, and political differences suggested that defendant's conduct was not culpable for failing to timely respond to plaintiffs discovery).

actual notice as a basis to set-aside judgment when the facts suggest its actions contributed to the failure to receive notice. Either Meaney was Atlas's representative in this litigation, received notice of the default judgment and failed to notify his client or Atlas simply 'dropped the ball' on this action creating a classic default posture by benign neglect. Neither scenario supports a finding of good cause to set aside the default judgment.

Under the second equitable factor, Atlas argues that the plaintiffs' assertion that it was a provider of raw asbestos fiber to plants where plaintiffs worked is not true. In evaluating any asserted defense in a Rule 60(b) motion, the "[l]ikelihood of success is not the measure . . . [r]ather, if any defense relied upon states a defense good at law, the meritorious defense has been advanced." *INVST*, 815 F.2d at 398-99 (quoting *United Coin*, 705 F.2d at 845 (emphasis in original)). A defense is considered sufficient if it contains "even a hint of a suggestion' which, proven at trial, would constitute a complete defense." *Id.* In its defense, Regardless of the merits of this defense, however, this factor alone cannot justify setting aside the default judgment.

Atlas admits that "the former attorney, Conroy, advised the new attorney for Atlas, Meaney, who did not even have the files, that he had received a notice of application for judgment that was set for hearing within days." Meaney testified that he notified Atlas' in-counsel, Dulude, of the hearing by telephone. Whether Meaney had the case file or not, he admitted that he would have attended the default hearing if his client requested that he do so.

Regardless of the fact that Dulude cannot testify as to

whether he notified Atlas of the hearing, every opportunity existed for the company to take some affirmative posture earlier in this action. Atlas knew its attorney withdrew from this case. For some unexplained reason, it hired an attorney to replace Conroy in this action who failed to enter an appearance. Atlas's argument that it was swamped by the sheer volume of asbestos cases is of little value when its attorneys actively sought to transfer any pending cases to newly appointed counsel. Issues like a potential default judgment should have certainly been a 'red flag' to follow up on the case. Atlas had the opportunity to take an active role in defending itself, but recklessly disregarded the affect of its conduct on the proceedings. This is a case in which the intransigence of the defendant renders a default judgment appropriate. *Compare with INVST Financial*, 815 F.2d at 400 (default judgments should not be used to discipline attorneys; it is the client who suffers by being deprived of his day in court).

The passage of time in this action has been significant. Eleven years have passed since the default judgments were entered by the Court. Even viewing this in the most conservative light, the plaintiffs have waited six years to collect on the judgments from Atlas's insurers. While "delay alone is not a sufficient basis for establishing prejudice", *Davis v. Musler*, 713 F.2d 907, 916 (2nd Cir. 1983), it may be considered if the evidence suggests delay will "result in the loss of evidence, create increased difficulties of discovery, or provide greater opportunity for fraud and collusion" *Id.* (citation omitted). Atlas has acknowledged that "[o]ne of the critical problem [sic] with these cases is the passage of time. In 1990, when these default judgments were brought to light, Atlas and undersigned counsel made a concerted effort to determine how these default judgments came to be entered five years earlier. *It was not easy*

then, and it is even more difficult now — six years later." Br. Supp. Mot. Relief J. at 4 (emphasis added). While the plaintiffs never argued loss of evidence or possible fraud and collusion, no one can argue that *initiating* discovery over ten years after an asbestos suit is filed creates increased difficulties.

The Court finds that neither good cause nor extraordinary circumstances exist to set aside the default judgment. Plaintiffs will be prejudiced and Atlas has engaged in culpable conduct. Based on the foregoing, defendants' Motion for Relief from Judgment is **denied**. Accordingly, an evidentiary hearing to address the scope of damages is scheduled **July 15,1997** at **10:00 a.m.**

IT IS SO ORDERED.

s/ George W. White
GEORGE W. WHITE
Chief Judge
UNITED STATES DISTRICT COURT

Supreme Court, U.S.
FILED
APR 7 1997
CLERK

No. 96-1258

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

ATLAS TURNER, INC.,

Petitioner

versus

HAROLD E. STRAUB and PAULINE STRAUB, husband and wife; BERNARD F. SIMBURGER and ROXIE L. SIMBURGER, husband and wife; and HELEN CONKWRIGHT, as surviving spouse of WILLIAM F. CONKWRIGHT, deceased, and on her own behalf,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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REASONS FOR GRANTING THE WRIT

THIS COURT HAS JURISDICTION TO CONSIDER THE QUESTIONS PRESENTED AND PETITIONER'S ARGUMENTS ON THOSE QUESTIONS

Petitioner Atlas Turner, Inc.[1] ("Atlas Turner") files this Reply Brief to address Respondents' argument that this Court lacks jurisdiction over this matter because the Petition for Writ of Certiorari ("Petition") was filed more than two years after the Ninth Circuit's decision, in 1994, in the first of two rounds of appeals involved in these cases. Respondents contend that this Petition should have been filed within ninety (90) days of the Ninth Circuit's first decision involving these matters.

Petitioner Atlas Turner contends that its Petition was timely filed, i.e., within ninety (90) days of the Ninth Circuit's second decision relating to these cases, issued on November 7, 1996 (Pet. App. 1a), and, therefore, Petitioner may raise in its Petition the validity of any previous decision, including the Ninth Circuit's 1994 rulings in these cases. As succinctly stated by the Seventh Circuit in *Air Line Pilots Association, International v. UAL Corporation,* 897 F.2d 1394, 1397 (7th Cir. 1990):

> A litigant in a federal case is not compelled to wait until the case is over before seeking certiorari, because it is not a requirement of certiorari to review an order of a federal court that the order be a final decision. 28 U.S.C. §§1254, 2101(e); S.Ct. R. 18. But the litigant is perfectly entitled to wait until the case is over, then appeal from the final judgment and raise on that appeal the validity of any previous orders that have not become moot in the interim. *Hughes Tool Co. v. Trans World Airlines, Inc.,* 409 U.S. 363, 365 n.1, 93 S.Ct. 647, 650 n.1, 34 L.Ed. 2d 577 (1973), . . .

Of course, the Seventh Circuit was following this Court's own decisions establishing its jurisdiction to consider federal questions decided in earlier stages of litigation:

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1. Pursuant to Supreme Court Rule 29.6, Atlas Turner, Inc. listed its related companies in its Petition for Writ of Certiorari at page iii. There are no amendments to that list.

> We now "consider all of the substantial federal questions determined in the earlier stages of the litigation ..." [citation omitted] for it is settled that we may consider questions raised on the first appeal as well as "those that were before the court of appeals upon the second appeal." [citations omitted]

Mercer v. Theriot, 377 U.S. 152, 153 (1964). *Mercer* was a wrongful death diversity action in which the judgment for plaintiff was reversed by the Fifth Circuit Court of Appeals for insufficient evidence and various trial errors. The Court of Appeals remanded the case for a determination of whether the plaintiff could justify a new trial. The Supreme Court denied a petition for a writ of certiorari. On remand, the District Court denied a motion for a new trial. The Fifth Circuit affirmed denial of the motion and the Supreme Court granted certiorari. The Supreme Court reversed, found the evidence sufficient, and remanded the case to the District Court with instructions to enter judgment on the jury verdict. In *Hughes Tool Company v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973) the trial court entered a default judgment in an antitrust action which was affirmed on appeal in 1964. The Supreme Court dismissed its writ as improvidently granted after the 1964 appeal. After the 1971 decision of the Court of Appeals, the Supreme Court granted certiorari and reversed and remanded the case with instructions to dismiss the action. In *Hanover Shoe, Inc. v. United Shoe Machinery Corporation,* 392 U.S. 481, 488 (1968), the trial court rejected the "passing on" defense in a treble damages antitrust case. The Court of Appeals affirmed and the Supreme Court denied certiorari. The subsequent trial resulted in a treble damages verdict which was affirmed in the second appeal. The Supreme Court affirmed rejection of the "passing on" defense after the second decision by the Court of Appeals.

In the first round of appeals in these cases, the Ninth Circuit held that Respondents were not required to serve their default judgments on Petitioner Atlas Turner, an instrumentality of a foreign sovereign, pursuant to 28 U.S.C. §1608(e) of the Foreign Sovereign Immunities Act ("FSIA"). The Ninth Circuit also held that Respondents did not have to strictly

comply with the service of process requirements of §1608(b) of the FSIA so long as Respondents proved Petitioner Atlas Turner had actual notice of the suits. (Pet. App. 15a.) The Ninth Circuit remanded the cases for determinations of whether Atlas Turner, Inc. had actual notice of the lawsuits. Thus, the 1994 judgments of the Ninth Circuit were not final. On remand, the District Court found that Atlas Turner had actual notice of the lawsuits. (Pet. App. 4a.) The Ninth Circuit upheld this determination in the second round of appeals (Pet. App. 1a.) The Ninth Circuit's decision in this second round of appeals does not render moot its decisions in the first round of appeals. As established by the cases cited above, this Court has jurisdiction to consider the questions raised in the first round of appeals.[2]

As to Respondents' assertions that Petitioner Atlas Turner has allegedly "made a practice of defaulting in virtually every lawsuit that has been filed against it since 1985" (Respondents' Brief at 14) and supposedly followed that alleged policy in these cases, these assertions are simply wrong and unfounded. Their sole purpose is to convince this Court, without any proof, that Petitioner has systematically disrespected the laws of this country and, therefore, is not entitled to the protections provided by the FSIA and other laws of this country. Such arguments fail to address the substantive issues raised in Atlas Turner's Petition. Atlas Turner respectfully submits that fair and consistent interpretation and application of the FSIA is an important question worthy of this Court's attention.

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2. Respondents' reliance on *Federal Trade Commission v. Minneapolis-Honeywell Regulator,* 344 U.S. 206 (1952) is misplaced because that case did not involve questions decided in an earlier appeal which were appealed to the Supreme Court after an intervening second appeal. Rather, the case involved a "final decree" of the Court of Appeals which repeated, without material change, the terms of its judgment which it had entered nine weeks earlier.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Fredric L. Goldfein

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